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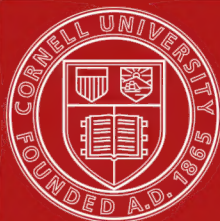
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A TREATISE
ON THE
LAW OF WILLS

BY
JAMES SCHOULER, LL.D.
LECTURER AT BOSTON UNIVERSITY LAW SCHOOL, AND AUTHOR OF
TREATISES ON "EXECUTORS AND ADMINISTRATORS,"
"DOMESTIC RELATIONS," ETC.

SECOND EDITION

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NOTE TO SECOND EDITION.

THE author has personally revised the present edition of this volume, making use of the latest English and American cases to illustrate his topics, upon the general plan originally pursued in preparing this work, and necessarily with most copious reference to the essentials of a probate.

This edition has been long deferred beyond the time which the sale of this book warranted, under the usual computation, from a feeling that members of the profession dislike frequent revisions of a text-book.

J. S.

April 15, 1892.

PREFACE.

THIS book has been prepared as a companion volume to the author's work on "Executors and Administrators," which was issued about three years ago, and found a rapid sale. It treats of Wills, their nature, essentials, and mode of interpretation; while the former book discussed the Administration of estates, testate and intestate, and the rights and duties of Executors and Administrators; and the two volumes together fairly comprehend the English and American law relating to Estates of Decedents, traced historically and logically down to the present day.

The writer's plan of treatment follows that pursued in his former volume, and described in its preface. Abstruse and superfluous details have been subordinated to the idea of clearly presenting to student and practising lawyer the main principles of our law; and, writing from an independent standpoint, the author has not felt hampered by the necessity of parcelling out our excellent American jurisprudence to hang in footnotes upon the random hooks of any English treatise. English and American systems are here freely compared, and their lines of legal thought placed in proper contrast. Statute models, forms of wills, and practical suggestions to testators will be found in the Appendix. In all matters which pertain to probate practice, it is believed that these two volumes will be found ample for general study and reference; while under the final head of Testamentary Con-

struction, in this volume, all the guiding principles are set forth, it is hoped, with sufficient fulness and precision.

The only American work which may be thought to have occupied before a field like this is the well-known and popular one of Judge Redfield. But the peculiar preparation of that work was such that further revision from the author's hand was looked for ; and with the death of that accomplished scholar and revered friend, more than ten years ago, and the extinction of his family line, not only has revision failed altogether, but other writers need no longer feel delicate in taking up the task anew. The present author may truly say that he has found far less assistance from that work than from those English standard authorities, Williams and Jarman, as annotated by our competent American editors.¹ The brief treatises of Hawkins and Sir James Wigram have proved serviceable, too, under the head of Testamentary Construction ; also Wharton and Stillè on Medical Jurisprudence, where the wills of insane persons are discussed. All such assistance, English or American, is fairly shown by the citations at the foot of each page ; and the present writer has collected his own materials, besides, relying throughout, as usual, upon his independent investigation of the law, and bringing the decisions, English as well as American, as nearly as possible to the date of publication.

JAMES SCHOULER.

BOSTON, January 1, 1887.

¹ Williams on Executors and Administrators, 7th English edition (Perkins's American notes), and Jarman on Wills, 4th English edition (Bigelow's American notes) are cited in the present work.

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THE LAW OF WILLS.

PART I.

INTRODUCTORY CHAPTER.

NATURE AND ORIGIN OF TESTAMENTARY DISPOSITION.

§ 1. **Definition of Will.**—A will, in our legal sense, is the solemn disposition of one's property, to take effect after death;¹ and in this disposition one fitly contemplates not only the purposes to which such property shall be devoted, but the person or persons by whom those purposes shall be executed, or carried into effect.²

The will being, in vernacular speech, that faculty by which we purpose and choose, the word itself comes naturally to denote the purpose, the choice itself as fixed upon, and hence, in our present technical sense of the word, the authentic and final declaration of that choice or purpose.

§ 2. **Last Will and Testament; Testament and Testator.**—“Last will” or “last will and testament” is the English phrase used from the earliest times as peculiarly appropriate

¹ Bouvier Dict. “Will”; Swinburne Wills, pt. 1, § 2; Godolphin, pt. 1, c. 1, § 2.

² As to the appointment of executors, see Schouler Executors & Administrators, §§ 30–52. Swinburne appears to have considered that the naming of an executor was indispensable to the validity of a will. Swinb. pt. 1, § 3; 1 Redfield Wills, 6, note. But modern opinion, English and American, is quite to the contrary. Schoul. Exrs. & Admrs.

§ 3. On the other hand, wills in modern times are frequently made for the exclusive purpose of naming an executor; the property itself, in such a case, being intended to go, by way of descent and distribution, as if no will had been made. Legislation and practice provide what, in each respect, the will in either event may have left wanting, after the general scheme which public policy has framed. See Schoul. Exrs. & Admrs. §§ 122–127.

to this solemn disposition, if not the indispensable means of denoting it. And, indeed, it should be observed that the use of the word "will" alone in this connection, rather than "testament," is confined to England and the countries whose language and jurisprudence are derived from the English source. "Testament" is the expressive word which the Roman civil law supplies in this connection;¹ the continental jurists make use of no other; and our own professional men, British and American, not only prefer still to link the words "will" and "testament" together, whenever one draws up a written disposition of this sort for a client, but found upon the Latin *testamentum* exclusively the secondary forms most convenient for discussing our general subject. He or she who makes the will is to this day, in English law, the "testator" or "testatrix," as the case may be; one dies "testate," leaving a valid will at his death, or "intestate" without one; we speak of "testamentary causes," "a testamentary gift," a "testamentary guardian," and "letters testamentary"; while "will," on the other hand, as used in our law, furnishes not a single derivative.² In brief, "testament" comes readily to hand, coined for the convenience of jurists the world over; but "will," which is at best a secondary medium of expression, does not. Blackstone in his Commentaries inclines plainly to a choice of the former, while regarding, it would appear, the two words as in substance synonymous;³ other English

¹ There has been some controversy as to whether the word *testamentum* is strictly derived from *testatum* or from that word in combination with *mentis*. Bac. Abr. "Wills and Testaments," A; Inst. 2, 10; Co. Inst. 111, 322. In Webster's Dictionary "testament" is said to come from *testari*, to be a witness, etc., from *testis*, a witness. And see 2 Bl. Com. 499. The controversy appears to be of little consequence, for in any view it is the final declaration of the person in regard to the disposition of his property. It is his *testimony* upon that subject, and that is the expression of his *mind* and *will* in relation to it.

Bouvier Dict. "Will"; 2 Bl. Com. 499.

That "testament" as an English word has a primary fitness here which "will" has not, is, however, obvious; for "testament" is defined as the formal legal declaration or expression of one's "will." See "Testament," Webster & Worcester. The civilians do not seem to define "testament" in their law with such precision. Domat, lib. 1, tit. 1, § 1; Bouvier "Testament."

² See Bouvier and other law dictionaries on this point.

³ 2 Bl. Com. 489 *et seq.*, chapter on "Title by testament and administration."

authorities of the last century and earlier drew subtle distinctions between "will" and "testament," while conceding, at least, that "will" or "last will" were expressions promiscuously used in English law.¹ We of the present day, however, may fairly treat "will," "testament," and "last will and testament" as legal terms standing, without practical difference, for one and the same thing.

§ 3. **Gift; Devise; Bequest.** — The usual phrase of testamentary disposition being, "I give, devise, and bequeath," it is well to notice the significance of these several words. "Gift," in our law, is a word of considerable scope, corresponding to the Roman *donatio*; it embraces all voluntary transfers of property without consideration;² and appears well adapted to the language of one's last will and testament, inasmuch as the ruling motive of the testator is to confer of his own free will and gratuitously. "Devise" and "bequest" are words of more technical constraint. "Devise," properly speaking, is a gift of real property by one's last will and testament; and cannot with legal precision be applied to things personal.³ "Bequest," on the other hand, is a gift by will of personal property; and the word is inappropriate where the disposition relates to real estate.⁴

Out of favor to the manifest intent of a testator, as shown by the context of the will, courts will often in these modern days construe "bequest" into "devise," and *vice versa*, notwithstanding verbal inaccuracies of this kind;⁵ and yet, wher-

¹ See Bac. Abr. "Wills and Testaments," A; Co. Inst. 111. Here it is said that by the common law, where lands or tenements are devised, it is properly called a last will; and where it concerns chattels only, a testament.

² 2 Schoul. Pers. Prop. 2d Ed. § 54; Bouv. Dict. "Gift," "Donation"; Schoul. Exrs. & Adms. § 368.

³ Bouv. Dict. "Devise." Formerly professional men were much inclined to narrow the definition of a last will and testament, so as to apply the term to personal property, using "devise" where

real estate was operated upon. For a devise of lands was treated at the common law not so much in the nature of a testament as a sort of conveyance by way of appointment of particular lands to a particular devisee. Harwood v. Goodright, Cowp. 90, *per* Lord Mansfield; 1 Wms. Exrs. 7th Ed. 6. But the more general and popular definition of a last will and testament embraces both real and personal property as above. See 4 Kent Com. 502.

⁴ Bouv. Dict. "Bequest."

⁵ Schoul. Exrs. & Adms. § 4.

ever disposition is intended of real and personal property in combination, the phrase "devise and bequeath" or "give, devise and bequeath" is certainly the more elegant, as well as the more accurate and comprehensive expression to use, when drawing up a will.

§ 4. **Property: Real, Personal and Mixed.**— Once more, a will which aims at some comprehensive disposition of property in combination, is often drawn as embracing "all my property, real, personal and mixed." We need not point out the distinction between real and personal property in the present volume; but shall only observe that "mixed property," so called, relates to that kind of property such as heirlooms and fixtures, which the law does not easily assign to the class exclusively, of real or personal; being, so to speak, a compound of both, or at the border line of division.¹

§ 5. **Legacy.**— That gift or disposition which comes to a survivor through one's last will is widely denoted as a "legacy." The term is more commonly applied to money or other personal property, in this connection, than to real estate; but "devise" standing, already, as we have shown, in technical contrast with "bequest" to mark a distinction, this word "legacy" acquires readily a popular sense, which regards rather the value of the gift, than the elements, real or personal, of which it may happen to be composed.² Unlike "bequest," moreover, the word "legacy" has a corresponding word "legatee," to designate the person taking under the will.³

¹ 2 Sharsw. Blackstone Com. 428; 1 Schoul. Pers. Prop. 2d Ed. §§ 94, 111.

² Schoul. Exrs. & Admrs. § 459; Bouv. Dict. "Legacy"; Wms. Exrs. 1051.

³ This is admitted in 1 Redf. Wills, 6, though the learned author appears to prefer "bequest" as the convenient term for general use. From what we have said in the text (§§ 2, 3,) the reader perceives that technical accuracy in the

use of these words, "devise," "legacy," and "bequest" is not insisted on by our courts in these days, so as to exclude the testator's obvious intent. Ladd v. Harvey, 1 Fost. 514. The word "legatee" has even been construed to mean "distributee" in a will out of regard to this same obvious intent of a testator. Lallerstedt v. Jennings, 23 Ga. 571.

§ 6. **Wills, Written and Unwritten, or Nuncupative.** — Wills or testaments are of two kinds, written and unwritten; the latter being also designated in law as verbal or nuncupative.¹ Nuncupative wills or testaments (which have a place in the Roman civil law) are so called from *nuncupare*, to name, declare or make a solemn declaration, because the testator declares his will *in extremis* before a sufficient number of witnesses whose oral proof must afterwards establish it. These verbal wills offer great temptation to fraud and perjury, besides occasioning much honest error, and the need of them lessens as the art of penmanship becomes more universal and writing materials abound. The Statute of Frauds, 29 Car. II. c. 3, laid them under various restrictions; and the tenor of legislation, English and American, at the present day is to invalidate them altogether, except as to soldiers in actual military service and mariners at sea.²

§ 7. **Codicils, or Postscripts to Wills.** — A codicil is in modern practice a sort of postscript to a will, being an exposition of the testator's afterthought.³ This word is derived from the Latin word *codicillus*, which is a diminutive of *codex*, and literally imports a little code or writing — a little will. Codicils came into our law from the Roman jurisprudence, but with an earlier significance quite different from that which modern usage attaches to them.⁴ As Blackstone has observed, the codicil is the testator's addition annexed to, and to be taken as part of the testament: "being for its explanation, or alteration, or to make some addition to, or else some subtraction from, the former dispositions of the testator."⁵

¹ 2 Bl. Com. 500.

² See Nuncupative Wills, c. *post*.

³ By this is not meant that a codicil is necessarily on the same sheet of paper with the original will or annexed to it in any way. It may be a separate instrument, like any will of later execution.

⁴ In the Roman civil law, "codicil" was defined as an act which contains dispositions of property in prospect of death without the institution of an heir

or executor. Domat. Civil Law, p. ii. b. iv. tit. 1, § 1. So, too, early English writers upon wills, Swinburne, for instance, defined a codicil to much the same effect; namely, as though it were a will which appointed no executor. Swinb. pt. 1, § 5. But our true modern definition is as stated in the text. See Bouv. Dict. "Codicil."

⁵ 2 Bl. Com. 500; Godolph. p. 1, c. 1, § 3.

He adds that the codicil may be either written or nuncupative.¹ In short, the codicil is part of the will, and the last will and codicils constitute one testamentary disposition.

But the objection to which all nuncupative instruments are liable applies equally to a codicil or a will. And under our modern rules of legislation the codicil or any later testament should be not only expressed in writing but executed with the same solemnity as an original instrument.² Hence, as codicils are apt at all times to cumber the construction of testamentary intent as well as increase the cost and trouble of probate, a testator of sound and vigorous mind, whose ideas of disposition are simple, will generally do well to destroy the earlier will and make a clean one, as his testamentary intention changes, in preference to tacking amendments one after another to the instrument first executed.

§ 8. "Will" includes "Codicil." — The word "will" being the generic, legal provisions relating to wills, such as their execution and personal capacity, should be understood in general to embrace codicils. And in our modern legislation upon wills, that no doubt may remain on this point, it is not uncommonly stated expressly that the word "will" shall include "codicils."³

§ 9. **Testaments in the Civil Law; Special Kinds; Mystic, Holograph, etc.** — Besides the nuncupative testament, the civil law still recognizes various kinds, derived for the most part from the Roman code, which have no footing in the jurisprudence of England and the United States. Two species, however, deserve a mention, which French and Spanish founders introduced into the system of Louisiana before its incorporation with the American Union. One is the "mystic

¹ 2 Bl. Com. 500. And see 1 Wms. Exrs. 8.

² 4 Kent Com. 531; *Tilden v. Tilden*, 13 Gray, 103; *Fuller v. Hooker*, 2 Ves. Sen. 242. See, further, as to Codicils, *post*.

³ *Bayley v. Bailey*, 5 Cush. 245. And see the English statute of wills

(1 Vict. c. 26) to the effect that in interpretation the word "will" shall extend to a testament, and to a codicil, and to an appointment by will or by writing in the nature of a will in exercise of a power; also to certain testamentary guardianships stated, and "to any other testamentary disposition."

testament," which consists principally in enclosing one's instrument of disposition in an envelope and sealing it in presence of witnesses.¹ The other is the "holographic (or olographic) testament," which is written wholly by the testator himself. Under our later codes it must be entirely written, dated, and signed by the testator's own hand; and being so prepared, it speaks for itself as declaring his last will, so as to be subject to no formality of witnesses.²

§ 10. **When a Will or Testament comes into Force; Revocation and Alteration.**—A will, though executed in one's lifetime, acquires no force as such until after the death of the testator. It may, therefore, be revoked or cancelled as well as altered by the testator at any time during his life, provided the intent and the suitable act concur.³ For every testament is consummated by death, and until he dies, the will of a testator is ambulatory.⁴ It follows that if the testator leave two or more inconsistent testaments behind him, the last shall prevail to the exclusion of every earlier one.⁵

This ambulatory quality of a will has been often pointed out as its prominent characteristic, distinguishing it, in fact, from ordinary dispositions by a living person's deed, which might, indeed, postpone beneficial possession or even a vesting until the death of the disposer, and yet would produce such postponement only by its express terms under an irrevocable instrument.⁶

¹ La. Civ. Code, art. 1577-1580; 5 Mart. La. 182.

² La. Civ. Code, art. 1581; Wilbourn v. Shell, 59 Miss. 205. And see Bouv. Dict. "Testament"; Part III. *post*; 4 Kent Com. 519, 520.

³ See Revocation of Wills, etc. *post*.

⁴ "Nam omne testamentum morte consummatum est; et voluntas testatoris est ambulatoria usque ad mortem." Co. Litt. 112; 2 Bl. Com. 502. "For where a testament is, there must also of necessity be the death of the testator. For a testament is of force after men are dead; otherwise it is of no strength

at all while the testator liveth." Hebr. ix. vs. 16, 17.

See, too, the language of the English Wills Act; "Every will shall be construed, with reference to the real estate and personal estate comprised in it, to speak and take effect as if it had been executed immediately before the death of the testator, unless a contrary intention shall appear by the will." Act 1 Vict. c. 26, § 24; 2 Jarm. Wills, 854.

⁵ Litt. § 168; 2 Bl. Com. 502.

⁶ 1 Jarm. Wills, 17; Brown v. Betts, 9 Cow. 208; Wait v. Belding, 24 Pick.

§ II. **Effect of a Subsequent Statute upon One's Will.**— "A will," it is said, "does not take effect, nor are there any rights acquired under it, until the death of the testator; and its construction and validity depend upon the law as it then stands." Hence it follows that "a statute passed after the making of a will, but before the death of the testator, by which the law is changed, takes effect upon the will."¹ Nevertheless, a retroactive effect should not be given by such later statute to an earlier will as to render, by the mere force of a new rule of construction, a different disposition under that will from what the testator obviously intended;² especially if the legislation manifested no retroactive intention.

On the other hand, however, it may be as to the legal operation of a valid will upon one's property, the rule is that if the testator was, at the date of making the will, without testamentary capacity, as in the case of a married woman, a subsequent statute which comes into force and remains so at the time of her death will not turn the invalid testament

136. Even though a will should in terms be made irrevocable, the testator may revoke it. 8 Co. 82 a.

¹ Eastman, J., in *Wakefield v. Phelps*, 37 N. H. 295. This statement appears inaccurate; though the decision was simply, in effect, to render the wife's devise of real estate to her husband inoperative, where a later act, in force at her decease, pronounced her incapable of devising land to her husband, while at the time of making the devise the statute recognized her general capacity. After-acquired lands will pass, if such clearly appears to have been the testator's intention, under a local statute to this effect, which was enacted after the will was made though before the testator's death. *Cushing v. Aylwin*, 12 Met. 169; *Bishop v. Bishop*, 4 Hill. 138; *Smith v. Edrington*, 8 Cr. 66. See preceding section.

² This statement appears to reconcile *Carroll v. Carroll*, 16 How. 275 (in construction of the Maryland statute concerning after-acquired lands) with

the cases cited in the preceding note. See language of Mr. Justice Curtis, ib. 283, distinguishing *Cushing v. Aylwin*, *supra*, and the broader terms of the Massachusetts statute; also *Smith v. Edrington*, *supra*. And see 15 Conn. 274; *Battle v. Speight*, 9 Ired. 288; *Mullock v. Sonder*, 5 W. & S. 198. Wills are governed as to their operation upon after-acquired lands by the law in force at the date of execution and not by that in force at the testator's decease. *Gable v. Daub*, 40 Penn. St. 217.

As to the husband's interest in a legacy to his wife, the rule of *Wakefield v. Phelps*, *supra*, is in New Hampshire applied in *Perkins v. George*, 45 N. H. 453. A husband whose wife dies after the passage of a statute extending one's right to take real estate in fee as a surviving spouse, cannot deprive him of such right by her will made previously, to which he has not assented. *Johnson v. Williams*, 152 Mass. 414.

into a valid one.¹ And in general the legality of the execution of a will should be judged of by the law as it was when it was executed, and not as it was at the death of the testator.²

§ 12. **Origin of Wills ; Natural Law of Succession.** — A few words as to the origin of wills are here appropriate. Upon this subject history preserves, indeed, but very little. Writers upon natural law, it is true, conceive of a primitive state of society, where, property vesting by common consent in the individual under the right of occupancy, that right, nevertheless, continued in the occupier only while he lived. But strife and confusion at the awful moment of religious rites and burial must have seemed intolerable even to barbarians of the basest type ; and decency soon framed a system by which the title of the dead proprietor descended at once, and with it, most probably, the responsible management of the funeral.³ For the progress of individual ownership and succession, as fundamental ideas of primitive society contrasted with occupancy for a lifetime, we may well conceive of these three stages : (1) Appropriation by government, that is to say,

¹ Kurtz v. Saylor, 20 Penn. St. 209. See also Dwaris Stat. 685.

² Mullen v. McKelvy, 5 Watts, 399; Prec. Ch. 77; Amb. 550; 3 Atk. 551.

A statute which changes the rules of evidence relating to the execution of wills has no retrospective operation; and a will must be proved as the law required at the date of its execution. Giddings v. Turgeon, 58 Vt. 106. As where a will at the date of execution was invalid if one of the three witnesses was husband of a legatee, and the legislature afterwards changed the rule. *Ib.* Where a statute in force when the will was executed required witnesses to subscribe in the presence of each other, this course must be observed or the will is invalid, notwithstanding a subsequent change of the statute. Lane's Appeal, 57 Conn. 182. In this last-mentioned case the whole subject is discussed, and, while the rule of our text is sustained, it

is admitted that the few decisions of American courts are not harmonious; South Carolina and Georgia seeming to take a contrary view. 3 McCord, 491; 43 Geo. 142. Of course, if the local statute expressly reserves the validity of former wills, the point is clear. 1 Bradf. (N. Y.) 252.

³ Puffendorf Law of Nations, Book 4, c. 10; 2 Bl. Com. 490. "The law of very many societies has, therefore, given to the proprietor a right of continuing his property after his death, in such persons as he shall name; and in defect of such appointment or nomination, or where no nomination is permitted, the law of every society has directed the goods to be vested in certain particular individuals, exclusive of all other persons." 2 Bl. Com. 490. The former method of acquiring, as the learned commentator adds, is called a *testament*, the latter an *administration*. *Ib.*

by the strongest survivor surrounding the deceased, whether as trustee for the common society, or rather in the semblance of an armed chieftain grasping for himself and his line. (2) The promulgation of a general scheme by that government or that chieftain in obedience to the profound affections of the individuals, whereby the inheritance vested in a member or members of the decedent's own family. (3) Recognition of a right in the individual owner to dispose of the title at his own choice and in variance, if need be, of the usual rules of inheritance. In this last recognition by society lies the sanction of a will; and this sanction reaches its refinement when we find the dead proprietor's wishes so far respected by the government, by his fellow-men, that he may safely disinherit, or transmit to strangers, or provide for the default of his own kindred, or bestow at pleasure upon selected objects of charity, by the formal declaration of his last wishes to that effect. And yet, as leading up to such a conclusion, we should remark, that from the moment that the doctrine and practice of transfers of property *inter vivos* by way of gift, sale, or bailment became established, men's minds were prepared for recognizing a transmission of title beyond the span of any occupant's own life. If, moreover, the owner could not lawfully make a testamentary disposition, he might, when dying, with full opportunity to do so, divide his property among those who stood at his bedside, and thus dispose of it *sui juris*, without a strict succession at all.

§ 13. **Origin of Wills; Historical Views of Succession.**— But, setting aside theories of social progress, whatever authentic history teaches us of the origin of the human race, confirms the opinion that the practice of allowing the owner of property to direct its destination after his death, or at least of imposing general rules of inheritance, is coeval with civilization itself and so close, in fact, upon the origin of property and property rights, as not to be essentially separated in point of antiquity. To take the Sacred Writings for instance. The first rule was exercised by a founder over his own family. The patriarch gave his dying blessing, and, as it would appear,

transmitted his own property to his descendants, regulating the inheritance at discretion; at all events, he was familiar with some scheme of inheritance which provided, not only for children or kindred, but for the contingency of their failure.¹ Abraham, our earliest type of the prosperous father of a family, amassing property in the midst of a civilized and peaceful society, who journeyed to Egypt, who grew very rich in cattle, servants, silver and gold, who paid out his thousand pieces of silver for a piece of land, and was respected far and wide as a man of wealth, is seen considering, while childless, who would be his heir, and after rearing children late in life and marrying more than once, giving all that he had to his oldest legitimate son, Isaac, at his death, and sending the sons of his concubines away with gifts. Isaac gives his death-bed blessing to the younger son by an error which he refuses, upon discovering it, to retract.² Jacob bequeaths to his son Joseph a portion of his inheritance double to that of his brethren.³ All of these seem to afford instances of death-bed disposition at patriarchal discretion; though Blackstone and other writers fasten upon that of Jacob alone as the more authentic, and perhaps the earliest recorded instance of the early use of testaments.⁴ That verbal testaments preceded written ones is altogether likely. And this very word "testament" which came down to us with the most sacred of associations, means, as a New Testament writer argues, not a mere covenant of God with the living, but something symbolical, which, like all testaments, requires death or the dedication of blood, to give it effect.⁵

If we turn to the Vedas, the oldest authority for the religious and social institutions of the Hindoos, the result is not different. Whether these ancient hymns, imperfect as must be their testimony, offer plain instances of a disposition by

¹ Gen. cs. xiii. xv. xxv.

² Gen. c. xxvii. This indicates how much solemnity was attached to the death-bed utterances by the patriarch who made them.

³ Gen. c. xlviii.

⁴ 2 Bl. Com. 490, 491, commenting

upon Gen. c. xv., and alluding to the fanciful relation, by Eusebius and others, of Noah's testament, made in *writing* and witnessed under his *seal*, whereby he disposed of the whole world. See Gen. c. x.

⁵ Hebrews ix. vs. 16-18.

testament, Sanscrit scholarship must determine; but certainly they depict a society where laws of succession as well as of transfer *inter vivos* are in full force, and the male issue (not wholly perhaps excluding the daughters) inherit and at the same time perform the funeral rites.¹ Homer's Iliad, once more, furnishes fair illustrations of oral testament and bequest, as well as inheritance.²

Respect for fundamental rules of inheritance may, nevertheless, have prevailed in various countries and ages as against the free license of a testamentary disposition. "Solon," observes Blackstone, "was the first legislator that introduced wills into Athens"; and he adds that in many other parts of Greece they were totally discountenanced; that in Rome they were unknown till the laws of the Twelve Tables were compiled; and that among the northern nations, particularly among the Germans, testaments were not received in use.³ Whether all this exclusion was absolute or only partial, and whether there might not have been permitted in some of these excepted instances a testamentary disposition of a certain sort, approximating a death-bed gift, especially if just in itself, it is not our province to inquire. Certainly the practice of transferring what one owns so as to take effect by his direction after death seems so reasonable and natural of itself that we may well conceive that it has existed always and everywhere in civilized society with rare exceptions; though it would not be strange if rude and property-despising people, like the ancient Germans and the Spartans under Lycurgus, condemned it.⁴ But so far as the operation of wills as such and in disregard of civil rules of inheritance is concerned, we

¹ 2 Wilson's Rig-Veda Sanhita, xvii.

² See, e.g., as to Patroclus, Iliad, 23d book, lines 90-93, 250-255, Chapman's translation.

³ 2 Bl. Com. 491; Plutarch's Solon; Pott. Antiq. l. 4, c. 15; Inst. 2, 22, 1; Tacitus De Mor. Germ. 21, cited ib.

⁴ "The general interests of society in its career of wealth and civilization, seem to require that every man should have the free enjoyment and disposition

of his own property; for it furnishes one of the strongest motives to industry and economy. The law of our nature, by placing us under the irresistible influence of the domestic affections, has sufficiently guarded against any great abuse of the power of testamentary disposition, by connecting our hopes and wishes with the fortunes of our posterity." 2 Kent Com. 502.

may agree with the standard commentator of English law, that even where the individual's right to make a will is permitted by law, "it is subjected to different formalities and restrictions in almost every nation under heaven."¹ We should add, however, that the formalities and restrictions which refined nations still impose upon this individual right are placed there chiefly in order to prevent a testator from unjustly discriminating against those of his own immediate family, or else for warding off in the courts a false interpretation as to what his last will really was; in either case fairly but not violently upholding the general laws of inheritance against unnatural caprice and fraud.

§ 14. **Origin of Wills in England.** — In England the individual right of testamentary disposition has been recognized from the earliest times; and a passage in the old law before the Conquest indicates that a Saxon nobleman would hardly have died intestate unless carelessness or sudden death prevented him from making his will.² Nevertheless, there is good reason to believe that the right of inheritance was firmly established in our mother-country earlier than that of disposition by will; that until times comparatively modern, one's testamentary right remained obstructed by certain arbitrary rules of distribution, as to his personal property, which the Crown and Church were interested to uphold. Thus, in the reign of Henry II. one-third part only of one's personal property could be willed away. For, according either to common law or custom (it is doubtful which), the widow and children long had their "reasonable parts" or thirds in the goods and chattels of the deceased, so that unless one died without either wife or issue surviving, the whole could not go according to his own disposal.³ Though leaving a will, he was bound to remember his lord and the Church; but if he died intestate, the crown and the ordinary remembered themselves; making very free, in fact, with whatever might remain

¹ 2 Bl. Com. 491.

² 2 Bl. Com. 492, 493, 495; Schoul.

³ 2 Bl. Com. 491, citing LL. Canut. Exrs. & Admrs. §§ 9, 497.
c. 68.

of his personal estate over and above the reasonable parts we have mentioned.¹

All this curious law is now swept away; and whatever customs may have formerly restrained the testamentary power have at all events been abolished in England by the statute 1 Vict. c. 26 (A.D. 1837), known as the Statute of Wills.² Earlier legislation led to this change of law, which was, indeed, so gradual that Blackstone, observing that in his own time one might by will bequeath the whole of his goods and chattels, declared himself unable to trace out when first the alteration began.³

§ 15. **The Same Subject: Devises of Land.**—Our historical study of the English law of wills is not complete without a further consideration of the ancient “devise,” which of course related in the earlier days of our common law to real, as strictly distinguished from personal property. It appears that lands in England were devisable by will prior to the Norman Conquest.⁴ Then was established the feudal system, and the feudal incumbrance imposed upon lands held in tenure that alienation could not take place without the consent of the lord; in consequence of which the power of devising was restrained, so as not to curtail his rights and privileges. This incumbrance, against which struggled family affection and the desire of independent dominion, yielded sooner where lifetime alienations were concerned than in dispositions to take effect after death. But the cunning of a feoffment to uses introduced a means of evasion whereby one could effectually devise his land until the Statute of Uses, 27 Hen. VIII., destroyed the privilege. Scarcely five years later, however, another statute of the same reign (32 Hen. VIII.) long styled the Statute of Wills (as amended by 34 Hen. VIII.) gave a broad sanction to the practice of devising lands directly; until

¹ 2 Bl. Com. 492, 493, 495; Schoul. Exrs. & Admsrs. §§ 9, 497.

² See this statute set forth at length, appx.

³ 2 Bl. Com. 492, 493. Whether the doctrine of reasonable parts was one of

general law or special custom in its origin, furnished matter of dispute. Ib. commenting upon Coke, 2 Inst. 33.

⁴ Wright Tenures, 172; 2 Bl. Com. 373; 4 Kent Com. 503.

by a statute of Charles II. the last traces of feudal tenure were abolished, and the disposition of real property by will was rendered absolute.¹ Once more, then, we reach the statute of 1 Vict. c. 26, by which all restrictions are now removed from the disposition of property in England, whether real or personal.²

§ 16. **Origin of Wills in the United States.**—Each of the United States has its own Statute of Wills, with variations to be noticed in detail hereafter. But as neither feudal tenure nor the doctrine of “reasonable parts” ever had a clear footing in this country, the American rule is, and has been, that one of suitable capacity may dispose of his real and personal property without restriction by a will duly executed with the prescribed formalities. Nor is it usual to require different formalities for different kinds of property, but to apply one rule to all of a testator’s property, real, personal or mixed, so that all may be comprehended in the same testamentary instrument.³ The English Statute of Frauds and Perjuries, 29 Car. II. c. 3, which directs that all devises shall be in writing, signed by the testator, and subscribed in his presence by a stated number of credible witnesses, is at the foundation of our American legislation on this subject.

§ 17. **Prevalent Rule of Succession; the Will of the State and the Will of the Individual.**—Now to consider the rule of succession⁴ as it stands at the present day in England and the United States. Upon the property, real and personal, of

¹ 4 Kent Com. 504, 505; 2 Bl. Com. 373, 374.

² See Stat. 1 Vict. c. 26 (A.D. 1837), set forth in our appendix. Section III. of this act contains the general enabling clause, beginning: “And be it further enacted, That it shall be lawful for every person to devise, bequeath, or dispose of, by his will executed in manner hereinafter required, all real estate and all personal estate which he shall be entitled to, either at law or in equity, at the time of his death, and which, if not

so devised, bequeathed, or disposed of, would devolve upon the heir at law, or customary heir of him, or if he became entitled by descent, of his ancestor, or upon his executor or administrator,” etc.

³ Our statute regulations on the subject of devise are, as to the old thirteen States especially, substantially alike and derived from the English statutes of 32 Hen. VII., and 29 Car. II. 4 Kent Com. 505.

⁴ The word “succession” as used in the present connection is one of civil

every one who dies it may be said that one or another of two schemes of legal disposition operates. (1) There is the will of the State; or, as the familiar phrase goes, the will which the law draws up. (2) There is the will which the individual has made for himself. In the former consists the expression of the public, of legislation, presenting what the State deems the fitter scheme for settling the great majority of estates; in the latter, that which the owner has chosen to suit his special circumstances, and which like any contract admits of the widest variety of forms. It sometimes happens that the individual scheme as set forth coincides with that of the State; possibly, too, one's own will may have comprehended but part of his property, leaving the will of the State to impress the residue; but more commonly the individual scheme seeks to work out a total disposition of its own, differing from that of the State. One who leaves no will of his own may, perhaps, be considered to have accepted that of the State; the latter operating, it is said, "according to the will of the deceased, not expressed, indeed, but presumed by the law."¹ But no such presumption is essential; for though inadvertence, sudden death, non-compliance with legal forms, or other cause, should account for its absence, the individual will is not so greatly respected by the public that the general scheme, the will which the law draws up should not be allowed with the utmost confidence to operate exclusively upon the decedent's estate in such a case.

The above expression is, of course, to be understood figuratively; for in the literal sense of our law, the operation of the will of the State furnishes the case of *intestacy*, but that of the individual's own will the condition of dying *testate*.

rather than common law jurisprudence. But it is very convenient for denoting the general devolution of title in property by death, and no term of the common law can well supply its place. By succession we mean the transmission of the rights and obligations of a deceased person to those surviving him, whether by a testament or without one. The

term will be found in English books on comparative jurisprudence; also in the codes of Louisiana and other American States, whose first settlers brought from continental Europe the institutions of the civil law. See Bouv. Dict. "Succession."

¹ Puff. Law of Nations, lib. 4, c. 11;
2 Bl. Com. 490.

§ 18. **The Same Subject: where the Will of the State is Paramount.** — Where, then, does the will of the State continue paramount to that of the individual? Or, in other words, what constraints does public policy still place upon one's power of testamentary disposition? confident that for the average of estates its own scheme is the better, still in no case permitting that the succession of local jurisdiction shall fall outside of both schemes.

(1) Wherever the individual, because of unsound mind, indiscretion, or some special subjection in his surroundings to fraud and undue influence, must be deemed incapable of making the will. (2) Wherever the individual will in question is not executed with all the formalities which public policy has seen fit to prescribe for the prevention of fraud and uncertainty. (3) Wherever the individual, though he made a will, is considered to have revoked it, directly or by a vital change of circumstances. (4) Where, under the circumstances, there has been some inconsistent mutual arrangement of property between parties, giving rise to what is known as their joint or mutual wills, or where perhaps the will turned upon some contingency. All these matters will receive extended treatment in the course of the present treatise, and it may truly be said in some of the above instances that the individual who died left no will of his own behind him.¹

§ 19. **The Same Subject: Husband and Wife.** — In other respects the decedent may have left a valid will of his own, duly executed, never revoked, and not inconsistent with any testamentary arrangement on his part or contingency of any kind. And yet public policy obstructs certain provisions of that will and sets them aside because it is thought unjust that they should operate. (5) In many of the American States a widow is protected by statute against the arbitrary disposition of her husband; for she may waive the provisions of the will made on her behalf and take her dower and a stated share of his personal property instead;² or, as the codes

¹ See these several subjects considered in detail, Parts II., etc., *post*.

² Mass. Pub. Stats. (1882) 750; Sch. Hus. & Wife, § 429; Heineman's Ap-

of some States provide, the widow is entitled to her share of her husband's real and personal estate without a waiver at all.¹ (6) Now that a married woman is allowed by many recent acts to make a testamentary disposition without her husband's concurrence, a similar restraint is placed by the legislature of some States upon her own arbitrary disposition against the husband; which fairly enough may end in allowing him a corresponding waiver of provisions made on his behalf under his wife's will.²

§ 20. **The Same Subject: Children unprovided for.** — (7) Children are not allowed any such privilege of waiver; yet public policy does not permit them to be cut off from their inheritance by any indirection of the testator. A child not expressly provided for under the parental will shall take his share as in the case of intestacy, unless it is shown that the testator had otherwise provided or that such omission was intentional.³ Posthumous offspring come within the same rule of protection; for, though not named in the parental will, they take the share which the State testamentary scheme prescribes.⁴ Legislation favorable in these respects to omitted children or issue, whether born before or born after the will, may be found in nearly all of the American States.⁵

peal, 92 Penn. St. 95; Comstock v. Adams, 23 Kan. 513. A husband cannot by a will made before marriage deprive his widow of her statutory share in his personal estate. Ward v. Wolf, 56 Iowa, 465. Aside from the widow's privilege of waiver, there are many of the United States where a man's will, made before marriage, is revoked, like a woman's, by the marriage. Stimson's Am. Stat. Law, § 2840; *post* §§ 424-426.

¹ See Stimson's Am. Stat. Law, § 2841.

² Sch. Hus. & Wife, § 464; Mass. Pub. Stats. (1882) 819.

³ Mass. Pub. Stats. (1882) 750.

⁴ *Ib.*

⁵ See 2 Jarm. Wills, 5th Am. edition,

Bigelow's notes; Stimson's Am. Stat. Law, §§ 2842-2844, where shades of statutory distinction are noted. These States and Territories have favorable statutes upon the points stated in the text concerning children: Alabama, Arkansas, California, Colorado, Connecticut, Dakota, Delaware, Georgia, Illinois, Indiana, Iowa, Kansas, Kentucky, Maine, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Nebraska, Nevada, New Hampshire, New Jersey, New York, North Carolina, Ohio, Oregon, Pennsylvania, Rhode Island, South Carolina, Tennessee, Texas, Utah, Vermont, Virginia, West Virginia, Wisconsin. And posthumous children may have rights under a will independently of statutes especially mentioning them.

§ 21. **The Same Subject: Gifts Void as creating Perpetuities, for Superstitious Uses, etc.** — (8) Gifts under the individual's will which fetter unreasonably long the free circulation of property are now pronounced void; the general rule being that any limitation (unless it be for charitable uses) which locks up the fund for a longer period than a life or lives in being, and twenty-one years beyond (allowing, in case of a posthumous child, a few months more for the term of gestation), is void. And according to modern construction, it is not sufficient that an estate may vest within this period, to avoid the objection of perpetuity, but the rule is that it must so vest.¹ This rule against perpetuities applies to capital

Pearson v. Carlton, 18 S. C. 47; *Clarke v. Blake*, 2 Ves. 673.

The language of the Massachusetts statute permits of parol proof, outside the will itself, that the testator actually intended to omit the child in question. *Bancroft v. Ives*, 3 Gray, 367; 6 Met. 400. And see *Peters v. Siders*, 126 Mass. 135. In *Coulam v. Doull*, 133 U. S. 216, this rule is followed, against that of California. An illegitimate child unintentionally omitted from its mother's will, is not entitled to the protection of the statute. *Kent v. Barker*, 2 Gray, 535. So, too, as to an illegitimate child, legitimated by a subsequent marriage, see *McCulloch's Appeal*, 113 Penn. St. 247. Nor is an estate in which one has merely a power of appointment within the statute. *Sewall v. Welmer*, 132 Mass. 131.

Under the Arkansas statute, which inhibits the exclusion of a child by will unless the child is mentioned by name, a general mention of children as a class, without stating the number of them, is not a mention in full compliance with the statute. *Arnold v. Arnold*, 62 Ga. 627.

Posthumous children at their birth take vested interests in their deceased parents' estate, subject to the contingencies of administration. *Knotts v. Stearns*, 91 U. S. 638; *Catholic Assoc.*

v. Firnane, 50 Mich. 82. Cf. *Pearson v. Carlton*, 18 S. C. 47.

But unintentional omission is not to be set up to defeat the regular probate of the will. *Doane v. Lake*, 32 Me. 268.

See further, *Riddle's Estate*, 14 Phil. 327; *Smith v. Robertson*, 89 N. Y. 555; *Wilson v. Fritts*, 32 N. J. Eq. 59; 5 Dem. (N. Y.) 374.

As to implications of intention to disinherit one's nearest relative, see *Dunlap's Appeal*, 16 Penn. St. 500.

¹ 1 Sch. Pers. Prop. 2d Ed. § 146; *Schoul. Exrs.* § 465; 2 Redf. Wills, 1st Ed. 845, 846; *Bengough v. Eldridge*, 7 Sim. 173; *Rand v. Butler*, 48 Conn. 293; *Odell v. Odell*, 10 Allen, 1; *Anthony v. Anthony*, 55 Conn. 256.

For a recent exposition of this subject with English and American citations and references to legislation, see 1 *Jarm. Wills*, 5th Am. Ed. 250-301, with *Bigelow's* notes. Statute provisions prevail on this subject in New York, Michigan, Alabama, Georgia, Indiana, Iowa, Mississippi, Maryland, Wisconsin, and other States. In New York and some other States the prescribed period of limitation is two lives in being. 1 *Jarm. Wills*, 5th Am. Ed. 250, 253. *Stimson's Am. Stat. Law*, §§ 1440-1442; *Gray's Perpetuities, passim*.

Thus, a gift to the children of "any

and income also. Income, by the old rule of the law, still prevalent in Massachusetts and some other States, may yet be prospectively accumulated for this whole period within perpetuities under the individual's will. But the unnatural will of Mr. Thellusson in the last century, which excluded from the benefits of the estate all children and descendants procreated during his lifetime for the sake of bestowing a princely fortune upon some strange and remote scions of the stock in some later generation, led to the passage of the English Stat. 39 and 40 Geo. III. c. 98, by which accumulation of real or personal property was declared restrained thenceforward for any longer term than the life of the settler or testator, and for twenty-one years from his death or during the minority of those surviving him who would be otherwise entitled. This, it is perceived, makes the restraint closer upon income than capital; and, though just in policy, American legislatures have not uniformly adopted the change.¹

(9) Gifts under a will to "superstitious uses" are likewise prohibited; though English legislation of this sort directed against the officers of the Roman Church is not approved to the fullest extent in this country; nor on either side of the water do the courts now incline to assert such a policy so boldly or so harshly as half a century ago.² On the other

son" of a life tenant is too remote, and it cannot be shown that the life tenant was past child-bearing at the testator's death. 39 Ch. D. 155. A bequest in perpetuity to keep the testator's private burying-ground in repair is bad. 79 Ala. 419; *Kelly v. Nichols* (R. I.) 21 Atl. 906. But local statutes come frequently in aid of bequests to provide for perpetual care of one's burial lot. A bequest in perpetuity to keep a clock in repair is void. *Kelly v. Nichols* (R. I.) *ib.* And see among various other cases, *Haynes v. Sherman*, 117 N. Y. 433.

Where a gift by will cannot be separated, the whole must be treated as void for remoteness. *Harvey, Re*, 39 Ch. D. 289. Otherwise where the gift can be

separated and part upheld as valid. *Vaughan, Re*, 33 Ch. D. 187.

¹ 1 Sch. Pers. Prop. 2d Ed. § 147; Schoul. Exrs. § 465; 2 Redf. Wills, 3d Ed. 560, 563; 1 Jarm. Wills, 5th Am. Ed. 302, Bigelow's notes; Odell *v.* Odell, 10 Allen, 1; Washington's Estate, 75 Penn. St. 102; Stimson's Am. Stat. Law, § 1443. In New York, Pennsylvania, Louisiana, and Minnesota may be found statutes reducing the common law rule of accumulation. 1 Perry Trusts, § 398; 1 Jarm. Wills, 5th Am. Ed. 302, note. As to the Michigan rule, see *Toms v. Williams*, 41 Mich. 552.

² 2 Redf. Wills, 495, etc.; Wms. Exrs. 1055; 1 Co. 22; *Cary v. Abbott*, 7 Ves. 490; 1 Jarm. Wills, 205-208.

hand, legacies and bequests to charitable uses have long been favored, both in England and the United States.¹

§ 22. **The Same Subject: Gifts Subversive of Good Morals.** — (10) Wherever a will makes a devise or bequest to further and carry into effect some illegal purpose which the law regards as subversive of sound policy and good morals, such devise or bequest will be held void, and the executor is justified in not paying it.² Thus, conditions of a testamentary gift tending to separation or divorce between husband and wife are treated as void;³ though it is otherwise with conditions which merely restrain one's surviving spouse from re-marriage; nor are other conditions restraining marriage wholly obnoxious.⁴ To the same general principle of good

English cases of earlier days have gone so far as to avoid residuary bequests made for educating children in the Roman Catholic faith. 1 Jarm. 205; 2 Redf. 495; Cary v. Abbott, *supra*. Or for the benefit of dissenters, though the rule is now otherwise. 2 Redf. 496, 497. All such bequests are permitted to stand by the law of American States, for religious toleration is widely practised, and we have no established church. The chief doubt of the present day may be raised where a gift is made for masses, prayers for the repose of the testator's soul, etc. It would appear that in England such a gift is still treated as invalid. West v. Shuttleworth, 2 My. & K. 684; Elliott, *Re* (1891), W. N. 9. But the American inclination is, in some late cases, to permit such gifts to stand. Powers' Estate, 134 Mass. 426. Other States hold rather to the old English rule. Uncertainty in the bequest aids sometimes the disposition to avoid such gifts. Holland v. Alcock, 108 N. Y. 312. And see Beckman v. Bonsor, 23 N. Y. 298; Jackson v. Phillips, 14 Allen, 549.

¹ 2 Redf. Wills, 1st Ed. 821; Jones v. Williams, Amb. 651; White v. White, 7 Ves. 423; Schoul. Exrs. § 464; Jack-

son v. Phillips, 14 Allen, 556; Williams v. Williams, 4 Seld. 525; Wms. Exrs. 1069, 1070, and Perkins's notes.

There is the English statute of mortmain, which puts restrictions upon the devises of land for charitable purposes. See act 9 Geo. II. c. 36 (1736); 1 Jarm. Wills, 219; 2 Redf. Wills, 508; Wms. Exrs. 1058 *et seq.* American legislation is not uniform on this topic. 2 Kent Com. 283. That charitable gifts are not open to the objection of perpetuities, see 1 Jarm. Wills, 5th Am. Ed. 251, Bigelow's note.

² 2 Beav. 151; 1 Salk. 162; 2 My. & K. 697; Habeshon v. Vardon, 7 E. L. & Eq. 228; Schoul. Exrs. § 463.

³ Conrad v. Long, 33 Mich. 78.

⁴ 2 Redf. Wills, 3d Ed. 290-294; 2 Jarm. Wills, 5th Am. Ed. 44 *et seq.*

The cases in the reports upon the question of conditions in restraint of marriage are very numerous and not easily reconcilable. But the refined distinctions on this point relate not to the devise of real estate, but to pecuniary provisions, and money arising from the sale of lands. By the civil law, to which English ecclesiastical courts much inclined, all conditions in testaments which operated in restraint of marriage,

morals and sound policy may be referred various miscellaneous constraints upon testamentary disposition which local law sees fit to impose. Thus, under the Louisiana code a will made in favor of the testator's concubine is treated as null and void.¹ And as to illegitimate children, our law has had

whether precedent or subsequent, were (with the exception as to one's widow) absolutely void. The chancery courts have adopted this doctrine, but not without some qualifications; for (to use the language of 2 Redf. Wills, 290) "the true rule upon the point is, that one who has an interest in the future marriage and settlement of the person in life may annex any reasonable condition to the bequest of property to such person, although it may operate to delay or to restrict the formation of the married relation, and so be to some extent in restraint of marriage." General restraints imposed on a legatee's marriage by a testator who has no interest therein, have, however, been deemed invalid as well as impolitic. Especially where there is no gift over on such marriage, the condition has been treated as merely *in terrorem* and void. 2 Redf. 291; Maddox v. Maddox, 11 Gratt. 804; 2 Jarm. 44 and notes; Reynish v. Martin, 3 Ark. 330. But, to escape inconvenient consequences, very subtle distinctions have been raised; and some of the latest cases turn upon the suggestion that the testator had not intended to impose this general (and therefore unlawful) restraint upon marriage, but merely to provide for the donee during celibacy. Jones v. Jones, 1 Q. B. D. 279; Cornell v. Lovett, 35 Penn. St. 100; Bigelow's note to 2 Jarm. 44. The gift over on default has been regarded as a vital element in sustaining such conditions. *Ib.*; Otis v. Prince, 10 Gray, 581; Lloyd v. Branton, 3 Mer. 108; Dawson v. Oliver-Massey, 2 Ch. D. 753. But the distinction is open to criticism. And some doubt in these modern days whether conditions in restraint of mar-

riage are, after all, impolitic. 2 Jarm. 44, notes.

Conditions, without a gift over, ought as to persons other than a surviving spouse to be limited to particulars, such as forbidding marriage under a certain reasonable age, or with some particular person, or without the consent of specified parties, or except at some specified place or with specified ceremonies. 1 Jarm. 44, Bigelow's note; Maddox v. Maddox, 11 Gratt. 804; Jervoise v. Duke, 1 Vern. 19; 3 Ves. 89. Conditions not to marry a man of a particular profession or any one without a stated large income have been declared invalid; while conditions not to marry a Papist or a Scotchman have been sustained. 1 Jarm. 44.

As to conditions restraining the re-marriage of the testator's widow, or rather provisions limited to her widowhood, the rule is well established that they are valid. 2 Vern. 308; Allen v. Jackson, 1 Ch. D. 399; Cornell v. Lovett, 35 Penn. St. 100; 2 Jarm. Wills, 44; 2 Redf. Wills, 295. And these conditions may be annexed to gifts, both of real and personal estate. 2 Redf. Wills, 294. A corresponding constraint may be placed upon the re-marriage of a widower. Allen v. Jackson, 1 Ch. D. 399. Apparently it is not necessary that there be a limitation over in such an event. Cornell v. Lovett, 35 Penn. St. 100.

This whole subject may be examined at greater length in 2 Jarm. Wills, 44 *et seq.*; 2 Redf. Wills, 290-298.

¹ Gibson v. Dooley, 32 La. Ann. 959. Cf. Donnelly, *Re*, 68 Iowa, 126, where a woman left her property to the man who lived with her as husband, but who had

a varying purpose to exclude them from the benefits of a will.¹ Doubtless the local conception of public policy on such points is liable in different jurisdictions and at different epochs to great variation, and decisions must greatly vary in consequence.

§ 23. **The Same Subject: Personal Incapacity to take under a Will.** — (11) Most persons are in modern times deemed capable of taking benefits under a will. But alien enemies² and other classes of persons may still be found prohibited by the local statute, on grounds of policy, besides those whose participation in these benefits could in any sense of the word be called immoral. And on the ground that no one shall profit by his own crime, it has been declared that a beneficiary who murders the testator cannot take under his will.³ Possibly the fraudulent concealment of a pre-existing marriage might defeat a bequest given to one as a *bona fide* spouse.⁴

Precaution against frauds has furnished a ground for declaring all legacies and devises void when made to the essential subscribing witness of a will.⁵ By this means, harsh

a lawful wife living. And see *Sunderland v. Hood*, 84 Mo. 293; 82 Ky. 93. Undue influence is often found an element in wills which bequeath property to one's mistress. *McClure v. McClure*, 86 Tenn. 174; *post* §§ 236, 237.

The question of what contravenes sound policy and good morals is for the court, not a jury, to decide. *Smith v. Du Bose*, 78 Ga. 413.

¹ See Schoul. Dom. Rel. § 281. Illegitimate children may now take equally under a gift to "children." *Ib.*; 37 Ch. D. 695; *Smith v. Du Bose*, 78 Ga. 413; L. R. 9 Ch. 147. But the English rule still excludes a future illegitimate child described solely by reference to its paternity. *Bolton, Re*, 31 Ch. D. 542, commenting on former cases. As to future illegitimates, however, who exist at the testator's death, see *Hastie's Trusts*, 35 Ch. D. 728.

² As to alien friends the incapacity formerly existing in England appears to have been removed by legislation of 1870. 1 Jarm. Wills, 67-69; and see next c. In the United States, the rule is that an alien may take lands by grant or devise; though he cannot hold it at common law against the State. He may also take a legacy for his own benefit. 1 Jarm. 68, Bigelow's note; *Craig v. Leslie*, 3 Wheat. 563; *Wilbur v. Tobey*, 16 Pick. 179; *Wadsworth v. Wadsworth*, 2 Kern. 376; 1 Kent Com. 54, 70, and cases cited.

³ *Riggs v. Palmer*, 115 N. Y. 506 (2 judges diss.). *Contra*, *Owen v. Owen*, 100 N. C. 240. This doctrine is a salutary one.

⁴ *Donnelly, Re*, 68 Iowa, 126.

⁵ 1 Vict. c. 26, § 15; Schoul. Exrs. § 76. It was long a question in the English courts whether a subscribing witness could be rendered competent

though it may seem, the witness becomes competent, because disinterested. The policy of the law extends sometimes to other beneficiaries for the sake of securing disinterested witnesses.¹

§ 24. **The Same Subject: Incapacity of Corporations.**— Under the statute 34 Hen. VIII. c. 5, bodies politic and corporate were expressly prohibited from taking by devise; and this disability operated equally whether the corporation was aggregate or sole, and even though the devise was in trust instead of beneficial.² But the incapacity to take land being a con-

by having his interest destroyed by means of a release or payment before his examination; and in a leading case Lord Camden contended for this view of a "credible witness" under the Statute of Frauds against the majority of the court. 4 Burn. Eccl. Law, 27; 1 Jarm. 70. The later statute of 25 Geo. II. c. 6, solved the difficulty by declaring all beneficial devises and legacies to the attesting witnesses void, rather than sacrifice the entire will. 1 Jarm. 71. By the act 1 Vict. c. 26, the principle is fully extended to wills of personal and real estate, and the English policy well established.

Under the statute of 25 Geo. II., above cited, it is decided: (1) That the devise or legacy must be to the witness beneficially, and not to one in trust in order to be thus annulled; (2) That the statute applies only where the witness takes a direct interest under the will and not where his interest arises consequentially; (3) That, as between a will and codicils, the interest which is given by force of the witnessed instrument, not that which is merely confirmed by it, is the interest which the subscription invalidates. 1 Jarm. Wills, 71, 72; *Cresswell v. Cresswell*, L. R. 6 Eq. 69; *Tempest v. Tempest*, 2 Kay & J. 635.

For the American doctrine, the wills acts of the several States, not wholly uniform in their provisions, should be

consulted. The provision most prevalent is to the effect that witnesses are incapable of taking any beneficial interest under the will, unless there is a sufficient statutory number exclusive of the witness in question. In New York and many other States, a witness who would have been entitled to a share of the estate had not the will been made, may recover to that extent. And in a few States the legatee, if dying before the testator, is expressly to be considered a legal witness of the will. 1 Jarm. Wills, 70, Bigelow's note; Schoul. Exrs. § 76. An heir at law, who is disinherited by a will, is a competent subscribing witness. *Sparhawk v. Sparhawk*, 10 Allen, 155.

In some States, the code still contemplates the release of his interest by a subscribing witness so as to render him competent. See §§ 350-357.

¹ Thus the statute of 25 Geo. II. c. 6 (extended as above shown, by act 1 Vict. 26) annuls the devise or bequest to the wife or husband of an attesting witness. 1 Jarm. Wills, 73. As to non-competency of a spouse apart from such a statute provision, see *Sullivan v. Sullivan*, 106 Mass. 474 and citations. For the general question of the competency of subscribing witnesses, such as executor or creditor, see Part III., *post*, c. 3.

² 1 Jarm. Wills, 4th Eng. Ed. 65.

sequence of that statute, it ceased to operate when the statute 1 Vict. c. 26 took effect. The latter statute contains no such prohibition, but leaves the corporate capacity to take under a will dependent upon general principles; and the general principle here operative is that the corporation may indeed take but cannot hold and exercise full dominion without a license.¹ That general principle excepts from its operation, however, such corporations as are already licensed, or authorized by legislation in their charters, to hold lands by devise; so far at least as such previous authority or license may happen to cover the case.² A devise to a corporation in trust is upheld, provided the trust itself be not illegal; and even when the corporation, before 1 Vict. c. 26, could not take in trust, so that the devise was void in law, the estate descended to the heir charged with the trust.³

The exception just noticed is seen to relate to lands. At common law corporations have been entitled equally with individuals, as it would appear, to take personal property by bequest; and various American decisions fortify this theory.⁴ But limitations and restrictions under the act of incorporation should here be regarded; to the extent, at least, of procuring an enabling act from the legislature to hold the property where the original charter privileges would otherwise be transcended.⁵ In Massachusetts and many other States no disa-

¹ 1 Jarm. Wills, 65, 66; Co. Litt. 2 b. By various early enactments, reaching back to Magna Charta, corporations were disabled from *holding* real property by devise though they might *take* it, the main objection, as it would appear, growing out of the loss of escheats and feudal profits to the lords by such perpetual tenure. The license of the crown protects the devise. *Ib.*

² 1 Jarm. Wills, 66.

³ Incorporated Society *v.* Richards, 1 D. & War. 258.

⁴ Phillips Academy *v.* King, 12 Mass. 546; Burbank *v.* Whitney, 24 Pick. 151; McCartee *v.* Orphans' Asylum, 9 Cow. 437; Gibson *v.* McCall, 1 Rich.

174; Thompson *v.* Swoope, 24 Penn. St. 474.

⁵ Enabling acts of this character are frequently met in the special legislation of American States at each session, that of Massachusetts for instance. Generally in the United States a devise of real or bequest of personal property may be made to any person or corporation capable by law of holding such real or personal property. Stimson's Am. Stat. Law, § 2610. But charter limitations as to the amount of property a corporation is entitled to hold, may deprive even an educational institution from taking an additional legacy. See Cornell University case (1889), 136 U. S. 152, sustaining 111 N. Y. 66.

bility to take by either devise or bequest is imposed by the statute of wills upon corporations. But the American rule is not uniform. Under the New York code for instance it is expressly declared that no devise to a corporation shall be valid unless the corporation be expressly authorized by its charter or by statute to take by devise; and in furtherance of the policy here announced it is decided in that State that "corporation" in the sense of the statute, excludes a devise to a foreign corporation of lands lying in New York although the corporation was authorized by its charter to take by devise, and that a devise to the United States cannot be supported either as to "person" or "corporation."¹

§ 25. **The Same Subject: Infancy, Insanity, Coverture, etc., does not incapacitate from taking.**—Although infants and insane persons are under legal disability to act for themselves, such persons are not incapacitated from becoming devisees or legatees under a will. For not to speak of the acts of a guardian done on behalf of one not *sui juris*, the latter's

¹ 4 Kent Com. 507; 1 Jarm. 65, Bigelow's note; Fox's Will, 52 N. Y. 530; White v. Howard, 46 N. Y. 144. But see American Bible Society v. Marshall, 15 Ohio St. 537, which announces a more favorable rule as to foreign corporations. A New York statute makes a devise to a corporation void if given by a will executed within two months of the testator's death. 4 Dem. 111. See Santa Clara Academy v. Sullivan, 116 Ill. 375.

Whether an unincorporated society may take property under a will is discussed in some recent cases. "To take and hold legal estate directly, to maintain actions as an aggregate body, and in a name of association, incorporation is necessary. But a voluntary association, meeting and acting under a common name, for a common object, especially a charitable one, duly organized by choosing officers, keeping written minutes of their votes and acts in the nature of a record, and thus being capa-

ble of being designated and identified by proof, is a body capable of being the beneficiaries of such a trust [*i.e.*, of lands] though not incorporated." Shaw, C. J., in King v. Parker, 9 Cush. 71. And see Tucker v. Seaman's Aid Society, 7 Met. 188. It is generally admitted that a liberal rule should apply, especially in case of a definite charitable gift made to a definite trustee, notwithstanding it would be void by the general rules because the persons to be benefited by it are unascertained. But in Pennsylvania a devise to an unincorporated "Infidel Society" has been treated as void from considerations of public policy and because the legislature was unlikely to incorporate such a society. Zeisweiss v. James, 63 Penn. St. 465. And under the policy of the New York code an unincorporated association appears to be treated with little favor as the beneficiary of a devise. Downing v. Marshall, 23 N. Y. 366.

acceptance of what is beneficial to him may be readily presumed.¹ This is a principle which both the common and civil law have applied to gifts in general, so long as the gift be not injurious in itself but the reverse.² As for coverture, it may seem a truism to assert that chancery, in advance of our revolutionary legislation of modern times, has permitted a married woman to take under a will to her sole and separate use, and free from her husband's control.³ And inasmuch as death ends the state of coverture, there is nothing to prevent a man from devising or bequeathing to his widow, even though a husband's conveyance to his wife *inter vivos* be invalid at common law.⁴

§ 26. **The Same Subject: Maxims of Testamentary Construction.** — (12) We may add, that while the judicial disposition constantly increases, in America especially, to seek out and give reasonable effect to a testator's wishes, through the dark envelopment of ambiguous and inaccurate phraseology, provisions which of themselves are unkind, destitute of natural affection, foolish, unjust, or hopelessly vague and uncertain, are not strained into place out of any undue solicitude for what the individual intended. Against such gifts the law's testamentary scheme may well be suffered to prevail. Every doubt may thus be resolved in favor of a just and sensible disposition, and not the reverse. If a class of takers is not clearly identified, kindred by blood are properly favored over kindred by affinity; bequests to executors or trustees are readily construed as given in trust unless the contrary is apparent; courts are less disposed to uphold an expectant interest in chattels, perishable ones especially, than in real estate. And while earlier and later cases antagonize to some extent in practical results, it is a fundamental maxim that bequests or trusts which are hopelessly vague and uncertain must alto-

¹ *Burdett v. Hopegood*, 1 P. Wms. 486; 1 Mer. 654; 1 Jarm. Wills, 76.

³ Schoul. Dom. Rel. §§ 83, 103.

² 2 Schoul. Pers. Prop. 2d Ed. § 90; *De Levillain v. Evans*, 39 Cal. 120; *Gardner v. Merritt*, 32 Md. 78.

⁴ Litt. § 168; 1 Jarm. 76; Schoul.

Dom. Rel. §§ 191-193.

gether fail;¹ and so, too, is it with impossible and repugnant conditions.²

§ 27. **The Same Subject: General Conclusion.** — All of the points thus enumerated should be taken well into account whenever the individual proposes to substitute a testamentary scheme of his own for that of the state; or, as in general speech, to have his estate settled after his death as *testate* instead of *intestate*. Under these various divisions are fairly comprised those restraints which modern law and policy have placed upon testamentary disposition. The disregard of such restraints should operate a total or partial intestacy, according to circumstances; though it is proper to observe that the courts, out of favor to the presumed intention of the testator, have leaned against any such construction of a will as results in partial intestacy. Hence, as to personal property, whatever thus turns out not to have been effectually disposed of, as, for instance, a void or lapsed legacy, falls most readily into the residuary fund. Not that the State scheme of testamentary disposition shall not take a partial effect where a fair construction of the will permits it, nor that a partial disposition of property may not be made by any individual who sees fit to do so; but because a presumption arises that the testator intended that his residuary legatee should have everything not particularly bestowed upon others, and that, having taken the trouble to make a will at all, his intention was to embrace all his property under it.³

§ 28. **What may be given by a Will.** — By the rule already noticed, which obtains in England and the United States in the present century, all the property which one owns may be disposed of by his last will and testament; and this embraces equally all the real and all the personal property to which he shall prove entitled, legally or beneficially, at the time of his

¹ 1 Sch. Pers. Prop. § 148; 2 Kent Com. 354; *per* Redfield, C. J., in *White v. White*, 21 Vt. 250; 2 Redf. Wills, 3d Ed. 29, 383-429; 1 Jarm. 356; 2 Ib. 438. And see more fully Part. VI. *post*.
² See 2 Jarm. 5th Am. Ed. 13.
³ See 2 Redf. Wills, 3d Ed. 115, 116; *Leake v. Robinson*, 2 Mer. 363; 18 Beav. 417; *Amb. 577, per Lord Eldon*.

death. Corporeal and incorporeal rights, and future and contingent interests which deserve the name of property at all, are herein included.¹ And the disposition regards presumably such property, real or personal, as the testator may be entitled to when the will comes into force, rather than what he has at the time of its execution; for it is according to the state of his affairs as they exist at his death that any deceased person's estate must be settled.²

Hence, a testator in whom is the legal title to lands which he had sold by a written contract, can transfer by his will both the title and the notes given for the purchase-money.³ Any equitable interest founded in articles of agreement for a purchase will thus pass.⁴ But in case of an uncompleted contract of this kind the state of liability of the party at his death governs the question between those who may claim under him.⁵ All contingent estates of inheritance, including springing and executory uses and possibilities coupled with an interest, and contingent remainders are devisable, if the person to take be ascertained.⁶ Vested estates are doubtless devisable, though liable to be defeated by the happening of some subsequent event or the non-performance of some condition.⁷ But there can be no devise, more than a trans-

¹ See language of Stat. 1 Vic. c. 26, § 3; Schoul. Exrs. §§ 1, 2. All interests in real and personal property are included under the terms of the English act which, at the decease of the testator would, if not so disposed of, devolve to his general real or personal representatives, or, if he become entitled by descent, on the heir or customary heir of the ancestor. 1 Jarm. Wills, 46. In a word, the basis is that of property transmissible by way of inheritance or assignment. 1 Sch. Pers. Prop. 2d Ed. § 71, etc.; 1 Redf. Wills, 388. Technical words like "seised" in statutes conferring the right to devise should receive a liberal interpretation. *Bailey v. Hopkin*, 12 R. I. 560; *Ingilby v. Amcotts*, 21 Beav. 585.

² Schoul. Exrs. §§ 1, 2; Redf. Wills, 4th Ed. 378. Language in a will which

expressly refers to the present time must, however, receive that construction. And specific gifts of stock or other property have naturally a present reference. 1 Redf. Wills, 380, 381; 14 Sim. 248.

³ *Atwood v. Weems*, 99 U. S. 183.

⁴ *Marston v. Fox*, 8 Ad. & E. 14; *Malin v. Malin*, 1 Wend. 625. But see *McKinnon v. Thompson*, 3 Johns Ch. 307.

⁵ 1 Jarm. Wills, 54; *Lord Eldon in Broome v. Monck*, 10 Ves. 597; *Lysaght v. Edwards*, 2 Ch. D. 516.

⁶ 1 Jarm. Wills, 5th Am. Ed. 46, Bigelow's note; 1 Ves. Sen. 391, 411; *Pond v. Bergh*, 10 Paige, 41; 4 Kent Com. 261; *Loring v. Arnold*, 15 R. I. 428.

⁷ 1 Redf. Wills, 390; 1 P. Wms. 563; *Winslow v. Goodwin*, 7 Met. 363;

mission *inter vivos*, of a possibility where the person to take is not ascertainable;¹ nor of any mere naked and remote expectancy coupled with no interest.² As for estates of which the grantor has been wrongfully disseised, they are not in technical strictness assignable; but as claims of this character may be pursued in equity, so by good reason ought they to be capable of testamentary transfer. A right of entry after disseisin, a right to set some transaction aside, should therefore pass under a will; and local statutes may be found which expressly make such rights transmissible in this manner.³ But one who is wrongfully seised cannot transmit a rightful interest.⁴

To claims for damages founded in tort the usual rules apply; and the survival of the action or not, is a material point for consideration, whether the injured party died testate or intestate. Estates held strictly in joint tenancy pass by a familiar rule to the survivor, while those held in common are transmissible. But the modern presumption, favored by legislation, construes a conveyance or devise to two or more to create a common rather than joint relation.⁵

§ 29. The Same Subject: Property acquired after the Will was made.—There can be no question that personal property acquired by the testator after making his will and during his

Ingram v. Girard, 1 Houst. 276. The rule is long since settled that executory devises are transmissible and devisable; not mere possibilities, but in the nature of contingent remainders. *Ib.*

¹ 4 Kent Com. 262.

² 1 Redf. Wills, 4th Ed. 389.

³ 1 Redf. Wills, 392: *Gresley v. Mousley*, 4 De G. & J. 78; *Humes v. McFarlane*, 4 S. & R. 435; *Varick v. Jackson*, 2 Wend. 166; *Watts v. Cole*, 2 Leigh, 664. As to a reversion expectant upon an estate tail, see *Steel v. Cook*, 1 Met. 281. Statutes in some States provide that no devise or bequest of any property shall be defeated by any disseisin or wrongful dispossession by another. 1 Jarm. 49, notes.

The right of entry against a mere adverse possessor, not founded in actual disseisin, is unquestionably devisable. *Doe v. Hull*, 2 D. & R. 38; 1 Jarm. 50.

⁴ *Smith v. Bryan*, 12 Ire. 11.

⁵ Mass. Pub. Stats. (1882) p. 744; 1 Jarm. 46.

See further, as to what comprise assets of a deceased person's estate, *Schoul. Exrs. & Admsrs.* §§ 198-228.

One may dispose of an insurance policy upon his own life by will. His widow and children have no claim thereto by way of obstruction. *Williams v. Carson*, 9 Baxt. 516; *Hamilton v. McQuillan*, 82 Me. 204; 83 Me. 295; 88 Ala. 241.

life is transmissible to a legatee, under general expressions of the will consistent with that intent, and that the testament may at all events assume to dispose of it.¹ To the devise of after-acquired real estate, however, technical objections have long been interposed by the courts on the theory of a seisin; for the testator, it was said, ought to be seised of the estate when he makes a will, and so on through all the intervening period to the date of his death; otherwise, the estate would not be supported.² This rule of the English law was recognized in most parts of the United States until times comparatively recent. But legislation has at length changed it in Massachusetts and various other States, for one more flexible and consonant to testamentary intent; namely, that one's will may operate upon his after-acquired real estate whenever such was his obvious intention.³ Parliament too has similarly altered the rule in England.⁴ And thus does the distinction of principle once sharply drawn between after-acquired real and personal property under a testamentary disposition gradually disappear.

¹ *Wait v. Belding*, 24 Pick. 136; *Loveren v. Lamprey*, 2 Fost. 434; *McNaughton v. McNaughton*, 34 N. Y. 201; *Nichols v. Allen*, 87 Tenn. 131.

² Redf. Wills, 387; 1 Jarm. Wills, 5th Am. Ed. 51. We have seen that a devise was formerly considered a sort of appointment of particular lands to a particular devisee, *supra*, § 3. It followed, that, unlike a will of personal property, after-acquired lands would not pass. *Wind v. Jekyl*, 1 P. Wms. 575; *Minuse v. Cox*, 5 John. Ch. 551; *Hays v. Jackson*, 6 Mass. 149.

³ 1 Jarm. Wills, 51, 326; 2 Redf. Wills, 388; 1 Wms. Exrs. 6, and Perkins's note; Stimson's Am. Stat. Law, § 2634. So strictly was this rule formerly applied that the plain intention of Mr. Girard's will was thwarted. *Girard v. City of Philadelphia*, 4 Rawle, 323. And if a mortgagee of land who made a will, afterwards foreclosed or perfected his title by taking an absolute deed of the premises, a new will

or codicil became needful. *Brigham v. Winchester*, 1 Met. 390; 5 Pick. 112.

For the statutes of the different States relating to after-acquired property, see 1 Wms. Exrs. 6th Am. Ed. 6, Perkins's note; 1 Jarm. Wills, 5th Am. Ed. 326, Bigelow's note; Stimson's Am. Stat. Law, § 2634. The governing test thus becomes one of the testator's actual intention, as shown by the will. See on this point *Kimball v. Ellison*, 128 Mass. 41; *Roney v. Stiltz*, 5 Whart. 381; *Dickerson's Appeal*, 55 Conn. 223; *Decker v. Decker*, 121 Ill. 341.

⁴ See Statute 1 Vict. c. 26, § 3, operating on English wills made since 1837. The power of testamentary disposition under the celebrated "Wills Act" is extended to all such real and personal estate as the testator may be entitled to at the time of his death, notwithstanding he may become entitled to the same subsequently to the execution of his will. 1 Wms. Exrs. preface; appx.

§ 30. **Scope of Investigation to be pursued.**—Having set forth the nature and origin of testamentary disposition, we now proceed to treat in detail of the law of wills, that is to say, of individual testaments. In our former volume we discussed the settlement of estates, from the common standpoint of testacy and intestacy; setting forth and distinguishing the general functions of those whose duty it is to administer, to collect, manage, settle and distribute. Upon comity and the conflict of laws in either connection we have dwelt at sufficient length; upon the appointment, too, of executors as well as administrators; upon the probate of wills, the qualification, the giving of bonds, the issue of letters testamentary or of administration; upon assets and the inventory; upon the general powers, duties and liabilities of those thus chosen to wind up the deceased person's affairs; upon payments and distribution, whether under a will or where there was none; and upon the accounting and allowances of executors and administrators.¹

This latter volume, though embracing necessarily much *post mortem* litigation, regards rather the living than the deceased owner of property; and it views him at the point of determining to frame and reduce to proper form a final testamentary disposition of his estate for the just guidance of those concerned in its settlement; to make a solemn charter which shall go into effect when he is no longer of this world, and by which his surviving family, kindred, friends, fellow-citizens and posterity shall hold him in remembrance. To the intended testacy of the individual we shall confine our present investigation; and the main subjects for our extended analysis here concern capacity and incapacity to make a will, the validity and formal requisites of wills, what constitutes revocation, revival and republication, and the general principles to be applied in testamentary construction. These, together with a few practical forms and suggestions, should amply suffice for an elementary treatise upon this interesting branch of the law.

¹ Schoul. Exrs. & Admrs. *passim*.

PART II.

CAPACITY AND INCAPACITY TO MAKE A WILL.

CHAPTER I.

TESTAMENTARY CAPACITY IN GENERAL.

§ 31. **What Persons may make a Will: General Rule.** — As a general rule, any person of sound mind, who has reached the age of discretion, and is under no constraint of will, may be pronounced capable of making a testamentary disposition of property in conformity with the prescribed forms of law.¹ This fundamental maxim holds universally good at the present day in England and the United States. Whatever exceptions exist will appear in the course of the discussion upon which we now enter; and those not consistent with the maxim itself we shall confine to the present chapter.

§ 32. **Measure of Capacity the Same as to Property Real or Personal.** — The measure of capacity requisite for making a valid will does not materially differ, whether the disposition relates to real or to personal property, or embraces both kinds. If the testator at the time of making the disposition has the sound mind and free will which the foregoing rule embodies, the law is satisfied, whatever species of property that disposition may include; otherwise it is not satisfied.²

There is reason, however, for holding that one of weak or failing intellect might grasp in his mind and memory the

¹ Cf. Swinb. pt. 2, § 1.

² 6 Co. 23; Sloan v. Maxwell, 2 Green. Ch. 563, 566. It is said in 6 Co. 23: "If he were of sane memory at the time of making the testament of

the goods, he could not be of non-sane memory at the time of the making of the will of the lands, both being made at one and the same instant."

arithmetic of a simple and small estate where that of a vast and complex one would tax him too severely;¹ which distinction, as applied to the credit or discredit of the testament, involves properly a consideration of the individual's business habits and experience while in his normal condition.

§ 33. **Whether Crime disqualifies from making a Will.**—English writers have made crime an exception to the rule of testamentary capacity in various instances. Indeed, the old common law with great severity inflicted the penalty of incapacity upon many classes of so-called guilty persons; not so much to humiliate them, we may suppose, as for enabling the crown the more surely to seize upon their property and utterly confiscate it. Swinburne enumerated among those who were thus legally disqualified in his day, slaves, villeins, captives, prisoners, traitors, felons, heretics, apostates, manifest usurers, incestuous persons, libellers, suicides, outlawed persons, those excommunicated and prodigals; a promiscuous list in which wrong-doers, unfortunates, and those of courageous conscience are found unhappily blended.² Scarcely any of these disqualifications now exist; for in the latest edition of Jarman it is shown not only that treason, felony punished by death, and suicide long remained on the list because of a legal forfeiture following conviction which legislation had gradually restricted, but that a statute of 1870 sweeps away all attainder, corruption of blood and escheat, in such instances, and provides in peculiar terms for a beneficial administration of the convict's property instead.³ Forfeiture consequent upon outlawry appears, in fine, to be the last remnant of the old law of criminal disqualification.⁴

¹ *Sheldon v. Dow*, 1 Demarest, 503, 511.

² Swinb. pt. 3, § 7; 1 Redf. Wills, 119; 2 Bl. Com. 499.

³ See Stat. 33 and 34 Vict. c. 23 (1870); also 1 Jarm. Wills, 43-45 and cases cited; *Bateman's Trust Re*, L. R. 15 Eq. 355; *Norris v. Chambres*, 29 Beav. 258; 7 Jur. N. S. 59, 712.

⁴ Proviso in Stat. 33 and 34 Vict. c.

23, cited 1 Jarm. 43. Outlawry, by the old law, produced an incapacity during the time one remained an outlaw; but with reference, it would appear, to goods and chattels rather than lands, and not without some subtle distinctions in the guilty person's favor. See 2 Bl. Com. 499; Swinb. pt. 2, § 21; Wms. Exrs. 7th Eng. Ed., 65.

All this learning concerning the criminal disability to make a will is of little practical consequence in the United States in these days. Forfeiture of estate beyond the life of the person attainted and corruption of blood are condemned expressly by the Constitution of the United States and in the jurisprudence of most States, even in the extreme but uncertain crime of treason; while under some of our local codes the power of forfeiture is wholly denied to the State.¹ Such has been the beneficial influence of public opinion in this country for the past century. In Kentucky it is decided that a person under sentence of death may make his will;² and there is no reason to doubt that the same rule obtains throughout the United States.

§ 34. **Whether Aliens may make Testamentary Disposition.**—The case of aliens supplies another instance of legal incapacity which the old law maintained more zealously than the enlightened policy of these days commends. Alien enemies and alien friends are here to be distinguished. Alien enemies seem affected for the time being, with a sort of criminal taint, or at all events, the law of nations thinks fit to harass them in a state of war with the government to which they owe allegiance; and hence the maxim which denounces persons of this class as incapable, without sovereign license of the hostile jurisdiction, to make any testamentary disposition of their property or even to reside or do business there.³ As towards alien friends, the favor shown is greater and requires further exposition.

Alien friends, or aliens whose country is at peace with the jurisdiction in question, have by the English common law, which has been adopted with local variations in most of the American States, been treated as incompetent to devise real estate, or, indeed, to hold it all.⁴ But they may dispose of

¹ 2 Kent Com. 385, 386; U. S. Constitution, Art. III. § 3.

² Rankin v. Rankin, 6 Monr. 531.

³ Bac. Abr. Wills, B. 17; 1 Wms. Exrs. 13.

⁴ Co. Lit. 2 b; 1 Wms. Exrs. 12. This incapacity extends to chattels real. Co. Lit. 2 b. But cf. Fourdrin v. Gowdey, 3 My. & K. 383.

their personal estate at pleasure.¹ For as Lord Chancellor Cottenham has observed, "The incapacity of aliens to hold land is founded upon political and feudal reasons which do not apply to money."² And hence an alien's purchase of real estate is not protected for his own benefit; not even though he should take the conveyance in the name of a trustee, leaving a vested interest in the land to himself;³ and yet if the trust created were to give him simply a beneficial interest in the pecuniary proceeds arising from a sale of land, the courts would protect it as valid.⁴ And pursuing this distinction, an alien may, as we find, be made a legatee, though not a devisee, where a conversion of real estate into money has given rise to the fund.⁵

§ 35. **The Same Subject: Theory of a Devisable Title.** — The theory of common law as to an alien friend's devise of lands regards it, nevertheless, as voidable by the government rather than absolutely void. The crown became entitled to the real estate after office found; and this whether the alien himself was enjoying the property during life, or his devisee after death; so that it was fair to assert that a title, though a defeasible one, vested in the one case or the other.⁶ The situation was harder where the alien died without having willed them away; for then the land escheated to the sovereign without office found, on the fiction that an alien can have no heirs.⁷ Such was the doctrine long upheld in England; and such, too, is the announcement of the law in our American States, independently of legislation to the contrary. In other words, an alien might take real estate by deed, or devise or other act of purchase, but he could not hold against the State; his estate, therefore, was defeasible, good against all but the State, and good against the State

¹ 1 Wms. Exrs. 12; *Craig v. Leslie*, 3 Wheat. 563, 589; *Polk v. Ralston*, 2 Humph. 500; *Bac. Abr. Wills, B.*

² *Du Hourmelin v. Sheldon*, 1 Beav. 79; *s. c.*, 4 My. & Cr. 525.

³ 1 Rolle Abr. 194, pl. 8; *Aleyn. 14.*

⁴ 1 Beav. 79; 4 My. & Cr. 525.

⁵ *Craig v. Leslie*, 3 Wheat. 563; *Anstice v. Brown*, 6 Paige, 448; 1 Redf. Wills, 10. And see *supra*, § 23.

⁶ 1 Jarm. Wills, 41; *Shep. Touch. 404.*

⁷ *Co. Litt. 2 b*; 1 Jarm. Wills, 41.

until proceedings instituted by inquest of office on its behalf had been carried to judgment.¹ And this disability of aliens to hold real estate extends, *pari passu*, in principle to their devise of such real estate and the devolution of title therein to the devisee.² But an alien could not take land by descent, because the law would not cast the descent upon one who could not by law hold the estate;³ nor, on the other hand, could the inheritance of an alien's lands vest in others when he had died without having devised them.⁴

§ 36. **The Same Subject: Late Statutes affecting the Disability.**—By the English Naturalization Act of 1870 these legal disabilities of aliens appear to have been substantially abolished in favor of a policy whose aim it is to protect equally in Great Britain the acquisitions of natives and foreigners; for by its second section an alien is empowered to take, acquire, hold and dispose of real and personal property of every description, in the same manner as by a natural-born British subject; and it is further declared that a title to real and personal property of every description may be derived through, from, or in succession to an alien in the same manner in all respects as through, from, or in succession to a natural-born British subject.⁵ The language of this act is not confined to alien friends, nor does it distinguish in terms between aliens resident in England or non-residents.⁶

Earlier legislation removing wholly or in part, or upon the

¹ Wilbur v. Tobey, 16 Pick. 179; Waugh v. Riley, 8 Met. 295.

² 2 Kent Com. 53, 69; Marshall v. Conrad, 5 Call, 364.

³ Wilbur v. Tobey, and Waugh v. Ripley, *supra*; Fairfax v. Hunter, 7 Cr. 603; Craig v. Leslie, 3 Wheat. 563; Fiott v. Commonwealth, 12 Gratt. 564; Jackson v. Adams, 7 Wend. 367, and cases cited; Rubeck v. Gardner, 7 Watts, 455; Ramires v. Kent, 2 Cal. 558. An alien cannot be tenant by the curtesy, for that is an estate which vests by act of law. Reese v. Waters,

4 W. & S. 145; Foss v. Crisp, 20 Pick. 121.

⁴ The land instantly "escheats to the people" in such a case. *Per* Chancellor Kent in Mooers v. White, 6 Johns. Ch. 360. To the same effect see Montgomery v. Dorion, 7 N. H. 475.

⁵ Act 33 Vict. c. 14, § 2 (1870). There are provisos to this section, not important to cite, which prevent the act from having a retrospective operation.

⁶ 1 Jarm. Wills, 41, comparing 7 and 8 Vict. c. 66, § 3; 1 Chitty Contr. 11th Am. Ed. 259.

compliance of formalities, the disabilities of aliens to take, hold, or transmit estate, real as well as personal, may be found in most of the American States. And provisions thus modifying in a liberal direction the disabilities of aliens are embodied in some of the more recent State constitutions.¹ As our present study concerns only the right of an alien to devise or become a devisee, these statute changes need not be examined in detail; but their policy favors leaving titles in land undisturbed on account of the alienage of any former owner, so that the State may be no longer the subverter in effect, but the protector of such acquisitions. Land being held subject so universally to regulation by the local sovereignty, the several States seem to have framed their independent systems as to the tenure of an alien, with very little reference to the national government or to one another; and so far as resident aliens in a State are concerned in this respect the local laws may well be left to operate. But, dictated though these civil privileges often are by a just and liberal policy, they must (to use the language of Chancellor Kent) be taken to be strictly local; and until a foreigner is duly naturalized, in accordance with the Act of Congress, he is not entitled in any other State to any other privileges than those which the laws of that State allow to aliens.² Those privileges and immunities of citizens in the several States which our federal constitution secures applies only to natural-born or duly naturalized citizens;³ and the power of naturalization, once exercised by the old thirteen States apart, has passed since 1789 to the Congress of the United States, that it may be uniformly and efficiently exercised by that sovereignty which declares war, makes peace, forms treaties and regulates intercourse with foreign nations, whose subjects are to us aliens, as citizens of the United States are to them.

§ 37. **Whether a Sovereign may make a Will.**—It is a matter of some consequence in Great Britain, though none in this country, whether the reigning sovereign may make a

¹ See *Lumb v. Jenkins*, 100 Mass. 527; 2 Kent Com. 70, 71; 1 Wms.

² 2 Kent Com. 70, 71. ³ *Ib.* And see U. S. Const. art. I. § 8; *ib.* art. IV. § 2.

will. The property which belongs to himself and not to the State or his people, he ought on principle to be capable of transmitting by his testament, though not crown lands or moneys appropriated to the public service. A statute of George III. recognizes this distinction, by pronouncing all personal property which may have been applied for the sovereign's privy purse not only disposable by last will and testament, but subject as assets to the payment of such private debts as his majesty may have left behind him.¹ But as earlier jurists of the realm dreaded to touch the delicate inquiry what things a sovereign might transmit by will as his own,² so have the English spiritual courts positively disclaimed all jurisdiction to regulate the settlement of a royal estate, or even to admit a royal will to probate.³

§ 38. **Wills of Seamen, etc.**—Seamen and soldiers are treated with peculiar indulgence in our law, as a class of persons not only entitled to the public gratitude, but requiring in a measure public protection against their own improvidence and the wiles to which they are exposed. Hence are found various provisions in English, if not American, statutes, which the courts of probate jurisdiction interpret as rendering the wills of seamen void when made by way of security for debt; a security of which the creditor takes the greater advantage, knowing that his debtor may die suddenly when far away, and so imposes a sort of duress to obtain it.⁴ The equity of such statutes does not, however, extend beyond the classes specified.⁵

¹ Goods of George III. 3 Sw. & Tr. 199; 1 Add. 255; 1 Wms. Exrs. 13-15.

² In the 16th year of King Richard II. it was assented in full parliament that the king, his heirs and successors, might lawfully make their testaments. This question, says Godolphin, is resolved in the affirmative; but of what things is such a *questio statûs*, as is safest resolved by a *noli me tangere*. Godolph. pt. 1, c. 7, § 4.

³ Goods of Geo. III. 3 Sw. & Tr. 199; 1 Add. 262. In this case Sir John Nicholl observed that no sovereign will

had ever been probated in the English ecclesiastical courts. The will of Henry VIII., or rather a copy of it, had been deposited in the registry, but merely, as it would appear, by way of safe custody or public information. But in a single obscure instance there was something like a reference to this jurisdiction, namely, with reference to the will of Henry IV. whose effects Henry V. took at their appraised value. 1 Add. 262.

⁴ 1 Wms. Exrs. 51, 52; Zacharias v. Collis, 3 Phillim. 190.

⁵ 2 Cas. temp. Lee 87; 1 Wms. Exrs. 52.

CHAPTER II.

INCAPACITY OF INFANTS.

§ 39. Incapacity of Infants founded in their Indiscretion.—The incapacity of infants to make a will is founded in their indiscretion ; and the policy of declaring them under a disability in this respect is sound. For if incapable at law of making a binding transfer of what he owns to take effect while alive and before reaching majority, still less should an infant be thought a suitable person to regulate by a comprehensive act which he does not live to recall at full age the disposition of his whole estate at his death ; thereby preventing the State's equal scheme of distribution from operating, by an assertion of will which sinister influences artfully surrounding him may in reality have produced, rather than his own free choice.

§ 40. Earlier Rule more Favorable to Infants' Wills than that of the Present Day.—The earlier rule was more favorable to the infant's right of testamentary disposition than that which prevails in England and America at the present day. Indeed, the doctrine of the Roman civil law, to which the English ecclesiastical courts gave assent, was, that infants at the age of fourteen, if males, and twelve, if females, might make wills of their personal property.¹ Nor did our canonists stand alone in granting such permission ; for common lawyers maintained the justice of allowing wills made at that early stage of life, the king's bench refused prohibitions when applied for to restrain the spiritual courts from passing such instruments to probate, and in various instances the practice received the express sanction of courts of chancery.² The

¹ Swinb. pt. 2, § 2; Godolph. pt. 6, c. 8, § 8; *Deane v. Littlefield*, 1 Pick. 239; 1 Wms. Exrs. 7th Ed. 16; 2 Bl. Com. 497.

² 1 Wms. Exrs. 16; 2 Bl. Com. 497; 2 Mod. 315; Gilb. Eq. Rep. 74; *Holland, Ex parte*, 11 Ves. 11. But the old books make some contradictory

age of permission thus accorded was the same substantially, as that which invested the infant with a right to consider his guardianship for nurture ended, and to elect, or at all events nominate, a guardian for himself.¹

This permission, we should further observe, was confined to an infant's personal property. From the Statute of Wills of 32 and 34 Henry VIII., infants under the age of twenty-one were expressly excepted;² and prior to that statute, as we have shown, not even an adult subject could be pronounced capable, under the English law, of making a devise of land from the days of William the Conqueror.³

§ 41. **The Same Subject.** — From this doctrine of testamentary capacity, during the latter years of minority with regard to personal property flowed certain consequences described by the older books. In computing the legal age of a person, whether for determining majority or otherwise, the day of birth should be included;⁴ hence, as fractions of a day are not reckoned, the testament of an infant born February 1, 1700, would be good in case of a male, under the rule of capacity we are considering, though made January 31, 1714; or, in case of a female, though made January 31, 1712.⁵ The

assertions on this subject. Lord Coke states eighteen to be the age. Co. Lit. 89 b. Others mention seventeen, and others, again, twenty-one. Co. Lit. 89 b, note by Hargrave; 2 Bl. Com. 497, Christian's note. The rule of the text may be concluded, however, the correct one. Ib. No local custom can be set up to sustain the will of a male infant made before he was fourteen years old. Com. Dig. Devise H, 2; 1 Wms. Exrs. 17.

¹ Schoul. Dom. Rel. 3d Ed. §§ 285, 289.

² 2 Bl. Com. 374, 375.

³ *Supra*, § 15. 1 Jarm. Wills, 33, observes that custom in some places enabled an infant to devise even real estate. See 2 Anders. 12.

⁴ 6 Mod. 259; Schoul. Dom. Rel. 3d Ed. § 391; 2 Kent Com. 233; 1 Bl. Com. 463; *State v. Clarke*, 3 Harring. 557.

So, too, a person attains his twenty-fifth year when he becomes twenty-four. *Grant v. Grant*, 4 Y. & C. 256.

⁵ 1 Sid. 162; Bac. Abr. Wills, B. 2; Swinb. pt. 2, § 2, pl. 7. Judge Redfield (while admitting that there is an unbroken array of authorities against him) objects on principle to this mode of computing the period from a person's birth, so that in legal effect capacity is sometimes carried back "two full days beyond the real date." 1 Redf. Wills, 20, 21. The objection is not without force, so far as giving validity to wills made far back in infancy is concerned; for the greater the restrictions judicial construction may place upon such wills the better. Yet there can be no question that the legal date of reaching majority ought to be clearly and definitely established by the law's computa-

will of course would operate as a valid disposition of chattels without and even against the consent of parent or guardian.¹ Likewise, the infant's express approval of a will made earlier and during the period of nurture would establish it as strong and effectual, if given after accomplishing this age of testamentary capacity.² A ratification, so to speak, similar to that by which one on reaching full age validates the contracts of minority³ seems here to operate; yet the mere circumstance of an infant having lived some time after the age when he became capable of making his will, should not without republication (so say these older books) give validity to one made during his incapacity.⁴ Indeed, this indulgence of a ratification at all transcends the bounds of good sense; and the better principle for modern times, under statutes which insist upon written wills and a formal execution, is that a will made during the age of incapacity can only be rendered valid at one's capable age by a republication with all the usual formalities.

§ 42. **Infant's Will Invalid, where Want of Discretion, etc., is shown.**—While the will thus executed could not be objected to merely because the testator was a minor, yet if the testator was shown not to be of sufficient discretion, that would overthrow the testament, as Blackstone says, whether his age were fourteen or four and twenty.⁵ Nor would indiscretion alone be a natural objection to so young a person's will, but

tion, and if so, the difference of about a day for adjusting the rights and burdens of full capacity to the new adult appears by comparison of very little consequence. The present rule for computing one's majority is convenient enough so long as it remains unshaken.

But the usual mode of computing the period under a will for the performance of some duty (aside from questions relating to one's age) appears to view the anniversary from the day of computation and not the day previous. The day of a testator's death is excluded from the reckoning of such a period.

And doubtless the rule in all popular celebrations of an anniversary differs from this common-law reckoning of one's majority. See 1 Redf. ib.

¹ Swinb. pt. 2, § 2, pl. 6; Bac. Abr. Wills, B. 1.

² 1 Sid. 162; Swinb. pt. 2, § 2, pl. 7.

³ Schoul. Dom. Rel. 3d Ed. §§ 432-448.

⁴ 1 Sid. 162; Swinb. pt. 2, § 2, pl. 5; 1 Wms. Exrs. 17; 1 Redf. Wills, 18, 19. But *cf.* the inaccurate language of 1 Jarm. 33, citing *Hinckley v. Simmons*, 4 Ves. 160.

⁵ 2 Bl. Com. 497; *Deane v. Littlefield*, 1 Pick. 243.

the undue constraint and influence besides, which adults seeking to regulate his disposition might exert upon him. Notwithstanding all this, there is an instance reported in which the will of a schoolboy only sixteen years old in favor of his schoolmaster was admitted to probate in the English ecclesiastical courts above a century ago where no evidence of fraud or undue influence or constraint was shown.¹

§ 43. Modern Legislation treats the Wills of Infants with Disfavor. — Modern legislation treats the wills of all infants, male or female, with obvious disfavor. Thus, the English statute 1 Vict. c. 26, expressly declares that "no will made by any person under the age of twenty-one years shall be valid."² The latest enactments of a majority of American States are to the same purport, establishing the age of twenty-one as that at which a person of either sex ceases to be disqualified from making a will either of real or personal estate; and among these States are Maine, New Hampshire, Massachusetts, New Jersey, Pennsylvania, North and South Carolina, Florida, Mississippi, Texas, Ohio, Indiana, Kansas, Kentucky, Michigan, Minnesota, and Nebraska.³ But other States vary in provisions concerning the testamentary capacity of infants. In California and Connecticut, for instance, eighteen years is taken as the testamentary age for both males and females; while various codes adopt a still earlier standard of discretion, distinguishing, however, in some instances between males and females or even between females married and unmarried. In New York, by a strange example, the age for making a will of personalty is eighteen in males and sixteen in females; nor is this the only State or the only quarter of the Union where the line is drawn between the kinds of property, so that an infant's personalty but not his real estate may be disposed of by testament before he reaches

¹ Arnold *v.* Earle, Cas. temp. Lee, Exrs. preface, and 2 Jarm. Wills; appendix. 529; Mss. June 5, 1758; 1 Wms. Exrs. 16.

² 4 Kent Com. 506; 1 Jarm. 32,

³ See 1 Vict. c. 26, § 7, cited 1 Wms. American note.

the age of twenty-one;¹ an antiquated distinction, it would seem, when the immense expansion of wealth in personalty during the present century is considered.

§ 44. Infant's Appointment of a Testamentary Guardian. — It is worth observing here that the policy of permitting an infant to create a testamentary guardianship has changed correspondingly within the last two hundred years. Under the statute of 12 Car. II. c. 24, which instituted testamentary guardianship, any father, whether infant or adult, might by last will or testament dispose of the custody and tuition of his child, so as to carry over the entire management of that child's property, during its minority or for any less period prescribed.²

But since the statute of 1 Vict. c. 26, an infant father cannot at English law create a testamentary guardianship at all.³

¹ States as wide apart as Rhode Island, New York, Virginia, Alabama, Missouri, and Oregon follow this latter principle in their codes. For these statutes (which are cited in 1 Jarm. Wills, 32, Bigelow's note; 4 Kent Com. 506), see more particularly the language of the several Codes, where minute differences of expression will be found, and where legislation is liable to change the local rule any year.

Scarcely any American cases of consequence have arisen on this subject. See *Moore v. Moore*, 23 Tex. 637; 7 Lea. 240. A will in favor of her guardian, made by a female ward of sixteen, in poor health; and in most matters easily influenced, should, it is held, be subjected to close scrutiny,

where such guardian took an active part in its execution. *Seiter v. Straub*, 1 Demarest (N. Y.) 264. This case bears strongly against the policy of the New York Code, in permitting wills of any kind to stand, when made by persons so young. An infant in New York cannot, of course, devise his land. 47 Hun, 109.

² Schoul. Dom. Rel. § 287.

³ *Ib.* See language of § 1 of Stat. 1 Vict. c. 26, to the effect that the word "will" under that act shall extend to an appointment by will or by writing in the nature of a will in exercise of a power, to the appointment of testamentary guardians and to any other testamentary disposition.

CHAPTER III.

INCAPACITY OF MARRIED WOMEN.

§ 45. **Incapacity at Common Law arising from Coverture.** — The incapacity of married women to make wills has its root in our common-law principle of coverture, by which husband and wife were treated as one person in such a sense that the woman took her place under the cover or protection of her lord; her rights not less than her obligations becoming suspended, for the better harmony and peace of the marriage state, while the husband exercised an undisputed sway as head of his household.¹ By the fundamental terms of their nuptial union, the husband remained capable of making his own will, though the wife if surviving could claim her dower, or life-thirds interest, in his real estate. But the wife, on the other hand, parted with all control over her own property while coverture lasted, presented her spouse outright or conditionally with the whole of her personal property, conferred upon him the usufruct during marriage of her real estate, which was enlarged, if a child was born alive, to a right by curtesy lasting for his whole lifetime.² With the property brought into the marriage state thus parcelled out by the common law, and a surviving husband entitled, moreover, to administer upon the estate of his deceased wife for his own benefit and recover her outstanding personal property to his own use and enjoyment,³ it is not strange that we find the female spouse laid under the disability of making her own will. For the law itself regulated the descent of her real estate, excepting her expressly from the Statutes of Wills, 34 and 35 Hen. VIII. c. 5;⁴ and as to her goods and chattels,

¹ Schoul. Hus. & Wife, § 54; 1 Bl. Com. 442, 445.

³ Schoul. Hus. & Wife, §§ 405-409; Schoul. Exrs. & Admrs. §§ 98, 106, 126.

² Schoul. Hus. & Wife, § 86; 1 Bl. Com. 442-445; 2 Kent Com. 130-143.

⁴ See 2 Bl. Com. 497, 498; 1 Jarm. Wills, 32; *supra*, pt. I. This makes a

her personalty, any will she might be declared capable of making, would necessarily be in derogation of the rights of her surviving husband.

A married woman, therefore, could not make a valid will. Her incapacity in this respect was not founded in contempt of her discretion; nor, save, perhaps, for the subtle marital influence which husbands of strong character are known to exert, in any legal denial of a capacity to exercise free will; but rather because of these disabilities of coverture which general policy imposed and in order that the husband's marital control of her property and right of succession might be preserved unimpaired. As maid or widow, any woman who had turned her majority was as free to dispose of property by a testament as man himself.¹

§ 46. **Marriage a Revocation.**—So, too, the marriage of a *feme sole* was treated by the common law as so entirely changing her condition in life and relations as to work *ipso facto* a revocation of any will she might have executed while single.² And such too was the effect, even where she survived her husband and was thus restored to the condition of single woman; for his death did not revive such will.³ But marriage had no such summary operation upon a man's will; as his right to hold property and dispose of it by testament was not seriously impaired by his nuptials, neither did those nuptials revoke the will he had previously made.⁴

married woman utterly incapable of devising lands, under an English statute which continued in force when the American colonies were planted. But *c.f.* *Wagner v. Ellis*, 7 Penn. St. 413, which lays stress rather upon the undoubted circumstance that of the wife's lands (except for curtesy) a surviving husband had in general no legal disposition, since they descended to her heirs.

A wife's disqualification to devise existed at common law prior to the statute of 34 & 35 Hen. VIII. c. 5, which was explanatory of statute 32 Hen. VIII. c. 1.

materially from that of infancy, idiocy, or lunacy. It does not arise from natural infirmity, but is the creature of civil policy." It may consequently be dispensed with in various instances unlike the other disabilities referred to. 1 Jarm. 38.

² 4 Co. Rep. 60, 61; *Hodsden v. Lloyd*, 2 Bro. C. C. 534.

³ *Cotter v. Layer*, 2 P. Wms. 623; *Garrett v. Dabney*, 27 Miss. 335; *Kurtz v. Saylor*, 20 Penn. St. 205. And see *Willock v. Noble*, L. R. 7 H. L. 580, 597.

⁴ *Schoul. Hus. & Wife*, §§ 442, 457. This subject of revocation by a subse-

¹ "The disability of coverture differs

§ 47. **Modern Changes effected by Courts and Legislation as to Wife's Incapacity.** — Maxims of equity, together with the married women's legislation of the last half century, have, however, as we shall show in the course of this chapter, made immense inroad into this early doctrine of the wife's incapacity for testamentary disposition; so that we find the female spouse, in these days, not only permitted to make her will, with considerable freedom, but relieved almost wholly of the old disabilities which the doctrine of coverture imposed upon her. Whether for better or worse, the inevitable modern tendency, both in England and throughout the United States, is from conjugal subjection to conjugal independence and the equality of the sexes, so far at least as the marriage relation is left to depend upon human institutions.¹

§ 48. **Exceptions to Incapacity; Wife may bequeath with Husband's Assent.** — First of all, various exceptions have been engrafted upon the wife's incapacity to make a will. Thus by the English law the wife may make a valid will of personal property, with the consent of her husband. But this is upon the condition that he survives her, and does not elect, after her death, to disaffirm his consent already given. The will of a married woman, when presented for probate, is treated on the face of it as a mere nullity.² But where it is alleged to have been made with the assent of the husband, the court assumes jurisdiction. Hence the wife's right in such cases is founded upon the husband's gift or permission, or, as it is said, the waiver of his own right to administer for his own benefit.³ And if the husband dies before his wife, her will is void so far as it could have derived any validity from his consent, and fails to operate against her next of kin.⁴

quent marriage with regard to either spouse, will be treated more at length under Revocation, *post*, and modern statutory changes in the rule will there be pointed out.

¹ See on the general subject Schoul. Hus. & Wife, §§ 7, 184-188.

² *Tucker v. Inman*, 4 M. & G. 1076;

Fane, Ex parte, 16 Sim. 406; 1 Wms. Exrs. 53.

³ 1 Redf. Wills, 23, 25; *Stevens v. Bagwell*, 15 Ves. 156; 1 Wms. Exrs. 55; *Smith, Goods of*, 1 Sw. & Tr. 127.

⁴ *Ib.* And see *Willock v. Noble*, L. R. 7 H. L. 580, 597, which intimates that though the husband had given some

This exception of a husband's assent is one which chancery and probate courts have asserted, without seeking the aid of any favorable legislation on this point. And the "license" in question (to borrow Blackstone's term¹) is so nearly a gift of his own property that in order to give it effect the husband must have assented to the particular will which the wife has made. His general assent that she may make a will is not deemed sufficient.² Nor can he be said to give his assent while ignorant of the contents of the will, and unable to ascertain them.³ And the time when this assent on his part shall make the particular will effectual or be withheld so as to defeat it is taken to be, not while the wife was living but after her death, and in fact when the will is offered for probate and the self-sacrifice on his part would be unequivocal. He may therefore revoke an assent given by him to the wife herself at any time while coverture lasts or after her death before probate.⁴

But the assent thus requisite on the husband's part may be inferred from circumstances subsequent to the coverture. And if after his wife's decease he acts upon the will or once agrees to it, he is not considered at liberty to retract his assent afterwards, and oppose the probate.⁵ Such acts even, as expressing gratification at his wife's selection of an executor, or recommending him to particular places to procure suitable preparations for the burial, may constitute a conclusive presumption of assent after the wife's death; at least, if the executor has been thereby induced to act under the instrument.⁶ So, too, it has been decided that the husband cannot withdraw his assent before probate, after giving the

informal assent to the will, his decease before the wife deprives such assent of its force.

¹ 2 Bl. Com. 498.

² *Rex v. Bettesworth*, 2 Stra. 891; 1 Wms. Exrs. 54.

³ *Willcock v. Noble*, L. R. 7 H. L. 580.

⁴ *Brook v. Turner*, 2 Mod. 170; 1 Mod. 211; Swinb. pt. 2, § 9; Schoul.

Hus. & Wife, § 458; 1 Wms. Exrs. 54.

⁵ *Brook v. Turner*, 2 Mod. 170; *Maas v. Sheffield*, 10 Jur. 417; 1 Rob. Ecc. 364; 1 Wms. Exrs. 54. Where the husband is named the executor and he proves the will generally, his assent will be inferred. *Fane, Ex parte*, 16 Sim. 406.

⁶ 1 Redf. Wills, 24; 1 Mod. 211; 2 Mod. 170.

sole legatee a written memorandum containing his sanction of the will.¹ And according to the older books, "a little proof" will suffice to make out the continuance of the husband's assent after the wife's death where she made the will in pursuance of an express agreement or assent on his part.² In general the probate of a will is conclusive, both of the capacity of the testator, being a *feme covert*, to make the will, and of the husband's consent.

§ 49. **The Same Subject; American Rule.**—The rule is general in this country that the husband may allow his wife to make a valid will of her personal estate, though not of her lands,³ and that his assent cannot be revoked after due probate of the will.⁴ And, as in English law, such a will may operate, by way of gift from the husband, so as to deprive him of the right to administer on the wife's estate for his own benefit, so as to vest her personal property of the corporeal or incorporeal sort in others, which otherwise would have been his own, or so as to enable some other person to settle the estate as her executor. The husband's general assent to make a will does not suffice, but must attach to the particular testamentary disposition which she may have made.⁵ This assent of the husband, it is likewise said, should be given at the time the will is proved;⁶ and there is authority for the assertion that the husband may withdraw his assent at any time before probate.⁷ But circumstances may es-

¹ Maas v. Sheffield, 10 Jur. 417; 1 Rob. Ecc. 364.

² Brook v. Turner, 2 Mod. 173, where the old law is stated at length; 1 Wms. Exrs. 54. And see Maas v. Sheffield, *supra*, where husband had witnessed his wife's will when it was executed.

³ Local statutes, that for instance of Massachusetts, will be found to vary this exception of lands. See *post*, § 57. So, too, it is held in Pennsylvania (but without reference to the statute of Henry VIII., *supra*, § 45) that the husband's assent may give validity to his wife's testament of land when he is her sole

heir thereto under the statute of descents. Wagner v. Ellis, 7 Penn. St. 413.

⁴ Cutter v. Butler, 5 Fost. 343; Fisher v. Kimball, 17 Vt. 323; Emery v. Neighbor, 2 Halst. 142; George v. Bussing, 15 B. Mon. 558; Wagner v. Ellis, 7 Penn. St. 413; Lee v. Bennett, 31 Miss. 119; Newlin v. Freeman, 1 Ired. Law, 514.

⁵ Kurtz v. Saylor, 20 Penn. St. 205; George v. Bussing, 15 B. Mon. 558; Cutter v. Butler, 25 N. H. 357.

⁶ *Ib.*

⁷ See Wagner, Estate of, 2 Ashm. 448; Van Winkle v. Schoonmaker, 15 N. J. Ch. 384. Cf. Cutter v. Butler, 25 N. H. 357.

tablish the surviving husband's assent at some earlier date.¹ The will should be presented for probate; and the decree of the probate court establishing the will of the married woman concludes its validity and her right to make it.²

Where local legislation provides an effectual assent to the wife's will in some other mode, as by the husband's writing, or imposes some other variation of the doctrine above stated, exceptions of judicial statement of course occur.³ This coverture doctrine of a will by the wife with her husband's license or assent is now dispensed with, wholly or partially, in the codes of various States, as we shall see presently.⁴

§ 50. **Wife's Disposition as Executrix.**—Another class of so-called exceptions to the wife's incapacity is, when she takes property in the character of executrix and her will is confined to what she takes in that character; in which case she may make a will without her husband's assent, and the ecclesiastical or corresponding court assumes jurisdiction.⁵ But if the wife had before marriage reduced to possession personal chattels, to which she was entitled as executrix and residuary legatee, or in some other way the husband's full ownership had attached, the wife cannot dispose of them by will.⁶

Since this exception does not concern property to which the wife takes a beneficial title, it can hardly be called an exception at all. For the effect of such an instrument is merely to pass, by a pure right of representation, to the tes-

¹ *Cutter v. Butler*, *supra*; *Wagner v. Ellis*, 7 Penn. St. 413; *Grimke v. Grimke*, 1 Desaus. 366; 2 ib. 66. In these South Carolina cases the fact that the husband wrote out the will appears to have been taken as strong proof of an assent on his part. But where there was no contract which made the property the wife's separate property during marriage, the better opinion defers the time of assent until the wife dies, leaving her husband surviving.

² *Parker v. Parker*, 11 Cush. 519;

Ward v. Glenn, 9 Rich. 127; *Cutter v. Butler*, 25 N. H. 357; *Lee v. Bennett*, 31 Miss. 119.

³ The Massachusetts statute being peculiar as to the husband's assent, the decisions of that State are not here pertinent. *Smith v. Sweet*, 1 Cush. 470; *Silby v. Bullock*, 10 Allen, 94; *Burroughs v. Nutting*, 105 Mass. 228.

⁴ *Post*, § 56.

⁵ *Tucker v. Inman*, 4 M. & G. 1076.

⁶ *Scammell v. Wilkinson*, 2 East, 552;

Cutter v. Butler, 25 N. H. 353.

tator or prior owner, such of his personal assets as remain outstanding.¹ The married woman, in other words, has as executrix power to make a will and to appoint an executor for the purpose of continuing the representation to the original testator.²

§ 51. **Wife's Will of Separate Property; English Rule.** — A third class of exceptions, recognized in England, is where property is given or settled, or is agreed to be given or settled, to the wife's separate use. In such a case, and with reference more especially to things personal, the wife has long been permitted to dispose of such property to the full extent of her interest, although no particular form be prescribed in the instrument creating the trust. This follows as an incident to the right of beneficial enjoyment; it makes her right of disposition complete.³ "I have always taken this ground," said Lord Thurlow in 1789 of this class of cases, "that personal property, the moment it can be enjoyed, must be enjoyed with all its incidents."⁴ And it may be affirmed, as a general principle, that personal property which has been acquired by a married woman under such circumstances that it became her separate estate may, independently of legislation which regulates the subject differently, or of express restraints, be dealt with by her as if she were a single woman.⁵

There is no reason for distinguishing between real and personal estate settled to the wife's separate use, save so far as the old statutes of disability to devise may be found to operate against married women. But the English cases for some time manifested a doubt on this point, and the testa-

¹ *Hodsdon v. Lloyd*, 2 Bro. C. C. 534; 1 Wms. Exrs. 54; *Schoul. Hus. & Wife*, §§ 163, 460.

² *Willock v. Noble*, L. R. 7 H. L. 580, 590, *per* Lord Chancellor Cairns.

³ *Fettiplace v. Gorges*, 1 Ves. Jr. 46; s. c., 3 Bro. C. C. 8; *Lord Eldon* in *Rich v. Cockell*, 9 Ves. 375; 1 Wms. Exrs. 61.

⁴ *Fettiplace v. Gorges*, 1 Ves. Jr. 46; s. c., 3 Bro. C. C. 8.

⁵ *Haddon v. Fladgate*, 1 Sw. & Tr.

48; *Smith, Goods of*, ib. 125; *Crofts, Goods of*, L. R. 2 P. & D. 18.

As to what shall constitute the wife's separate property, so as to be held subject to this mode of disposition, see *Schoul. Hus. & Wife*, Part V. cs. 1-5.

The English practice is to grant a limited probate of the wife's will so as to operate upon the separate property disposed of. See *Crofts, Goods of*, L. R. 2 P. & D. 18.

mentary *jus disponendi* was thought not so clear in the case of separate real estate as of separate personalty. But since the separate use originated as the creature of equity, English chancery courts appear to have concluded to embrace under its protection separate property of either class. For in *Taylor v. Meads*, the wife had lands conveyed in trust to her separate use, with a power given her to appoint it by any instrument in writing "to be by her signed, sealed and delivered" after a certain manner; the formalities required being greater than the Statute of Wills required for testamentary dispositions. The property was limited over to others in default of such appointment. She made an instrument in writing, which conformed to the Statute of Wills; but which, not being under seal, was not in accordance with the power given her. It was decided that the instrument was defective as the execution of a power of appointment; but that it was a valid devise, such as she had the right to make, of estate settled to her sole and separate use.¹ And the rule of English chancery is now well settled that a married woman may pass her separate real estate by will as a *feme sole*, not less than her personal property.²

§ 52. **The Same Subject.** — In thus recognizing the right of a wife to dispose by testamentary instrument of her separate property chancery assumes that neither legislation on the subject of wills, nor a special restraint combined in the instrument which settles the property to her separate use, obstructs the wife's free disposition by testament. Such legislation or such a restraint, if it exist, must operate; and hence the clause "against anticipation," so-called, which in English settlements of this kind has often been used to tie up the wife's hands and prevent her from alienating or incumbering the separate property during coverture, excludes her right as a married woman to alienate it by will.³

¹ *Taylor v. Meads*, 4 De G. J. & S. 597; *contra*, *Buckell v. Blenethorne*, 5 Hare, 131. a will defeats the husband's equitable right to curtesy. *Cooper v. Macdonald*, 7 Ch. D. 288.

² See *Hall v. Waterhouse*, 5 Giff. 64; *Pride v. Bubb*, L. R. 7 Ch. 64. Such

³ See Schoul. *Hus & Wife*, § 202, as to the clause of "restraint upon antici-

On the other hand, as this doctrine of a separate use extends to settlements antenuptial or (if founded upon a consideration) postnuptial, we may conclude that the will of a married woman may operate as to property thus settled upon her without restriction, as incidental to her right of alienating and disposing of it, and without any express clause empowering her.¹ And the will permitting her testamentary disposition of her separate property prevails, whether such property be in possession or reversion, whether vested in present interest or in expectancy.² And where she may thus dispose of the principal of the fund she is presumed capable of disposing of income, savings and accretions as well.³ Nor is it essential that the property came to her separate use without the intervention of trustees; for it is a well-known rule that equity will treat the husband himself as trustee rather than suffer the wife's beneficial enjoyment of her separate property to fail.⁴ Separate earnings and the profits and stock in trade of a separate business carried on by the wife may carry all the incidents of separate property.⁵

A husband's declaration of trust in favor of his wife for her separate use may be either express or implied.⁶ Moreover, the wife's will of separate property being a good one during coverture, the will continues good when coverture ends, whether wife or husband be the survivor.⁷

§ 53. **The Same Subject: where Spouses live apart.**—So far extends our doctrine of a separate use involving a separate

pation" to be found in settlements to the wife's separate use. *Troutbeck v. Boughey*, L. R. 2 Eq. 534, bears in this direction.

¹ 1 Jarm. Wills, 39. And see as to such settlements, *Schoul. Hus. & Wife*, Part VII.

² *Bishop v. Wall*, 3 Ch. D. 394; *Lechmere v. Brotheridge*, 32 Beav. 353; 1 Wms. Exrs. 61, 62; 1 Jarm. Wills, 40. As to the wife's will of property in which she has an expectant interest, but that interest does not actually vest in her until after her husband's death, see *Willock v. Noble*, L. R. 7 H. L. 580.

³ *Prec. Ch.* 44; 1 Eq. Ca. Abr. 66, 68; *Brooke v. Brooke*, 25 Beav. 342; *Darkin v. Darkin*, 17 Beav. 578.

⁴ *Tappenden v. Walsh*, 1 Phillim. 352; 1 Wms. Exrs. 62; 1 Jarm. Wills, 40; *Hall v. Waterhouse*, 5 Giff. 64, which supported the wife's devise of land on such a principle. And see *Schoul. Hus. & Wife*, § 191.

⁵ *Ashworth v. Outram*, 5 Ch. D. 923; *Haddon v. Fladgate*, 1 Sw. & Tr. 125.

⁶ *Baddeley v. Baddeley*, 9 Ch. D. 113; *Schoul. Hus. & Wife*, §§ 291-320.

⁷ *Bishop v. Wall*, 3 Ch. D. 194.

right of disposition, that covenants under a separation deed for the wife's benefit are now upheld as not obnoxious to sound policy. Whatever the wife acquires and holds for her sole and exclusive use and enjoyment under such a deed may accordingly pass by her will as though she had no husband.¹ More generally, the savings of money which a husband transmits from time to time to his wife from whom he lives separate, for her maintenance and support, have in equity all the incidents of separate estate.² The wife's earnings, too, while abandoned by her husband usually follow the same principle, the subject being expressly regulated in great measure by legislation.³

The wife's capacity as in effect that of a single woman becomes thus extended from the old hypothesis of the husband's civil death. Wherever her husband is dead at the law, a married woman may make a will. As where he has been banished for life;⁴ or is transported for life;⁵ or is an alien enemy.⁶ For in such cases the wife is no longer regarded as under the disabilities of coverture. And some have thought that while a husband's marital rights are suspended, as by his temporary banishment, his wife ought to be able to make a valid will of property acquired by her in the meantime.⁷

§ 54. **Wife's Will of Equitable Separate Property; American Rule.**—The American rule follows the English, as to the

¹ *Pride v. Bubb*, L. R. 7 Ch. 64.

² *Brooke v. Brooke*, 4 Jur. N. S. 472; s. c., 25 Beav. 342; *Schoul. Hus. & Wife*, § 485; *Tharp, Re*, 3 P. D. 76.

³ See *Haddon v. Fladgate*, 1 Sw. & Tr. 48, where a verbal separation had taken place, and the spouses never afterwards cohabited. See also *Schoul. Hus. & Wife*, § 486.

The English divorce act, 1857, recognizes the will of a married woman as to property acquired by her after a protective order. This order issues on the ground of her husband's desertion. *Worman, Goods of*, 1 Sw. & Tr. 513; 1 Wms. Exrs. 60.

⁴ *Portland v. Prodgors*, 2 Vern. 104; *Compton v. Collinson*, 2 Bro. C. C. 377; 1 Wms. Exrs. 63.

⁵ *Newsome v. Bowyer*, 3 P. Wms. 37; *Martin, Goods of*, 15 Jur. 686; *Atlee v. Hook*, 23 L. J. Ch. 776.

⁶ 1 Salk. 116.

⁷ *Franks, Ex parte*, 1 Moore & Sc. 11. But see *Coombs v. Queen's Proctor*, 2 Roberts. 547. For application of this doctrine to the case of a felon convict transported for life, notwithstanding his conditional pardon, see *Martin, Re*, 2 Roberts. 405; *Coward, Re*, 4 Sw. & Tr. 46; 1 Jarm. Wills, 40 and note.

wife's power to dispose of her equitable separate property, wherever American courts have assumed full jurisdiction of the "separate use" as the creature of equity. Hence it is ruled in several of the United States that the wife's will of property settled to her separate use may operate; and that a married woman, when not restrained from alienation, may, as an incident to her separate estate, and without any express power, dispose of it by instrument *inter vivos* or will.¹ But the doctrine is by no means so universally nor so boldly sustained by our chancery courts as in those of England; and inasmuch as "separate property" is of statutory rather than equitable origin from our American point of view,² and local statutes in point are constantly found touching the wife's will and her testamentary capacity, we may defer the discussion for a moment.

§ 55. **Modern English Statutes of Wills.** — Married women, we have seen, were expressly excepted from the Statute of Wills, 34 and 35 Henry VIII. c. 5, though no new disability was thereby created, since they had been regarded as incapable at a much earlier date.³ The present English Statute of Wills, 1 Vict. c. 26, § 8, provides that "no will made by any married woman shall be valid, except such as might have been made by a married woman before the passing of this act."⁴ But the exceptions have so multiplied upon the prohibition of late years as to constitute of themselves a permissive rule. Nevertheless, it is laid down that the classes of exceptions remain essentially as before; namely, those of wills with the husband's assent, of dispositions as executrix and in another's right, and of separate property; to which might be added that anomalous class of wills in execution of a power, of which we shall presently speak.⁵ It is the encroaching

¹ 2 Kent Com. 170, 171; *Porcher v. Daniel*, 13 Rich. 349; *Buchanan v. Turner*, 26 Md. 1; *Cutter v. Butler*, 25 N. H. 343; *Burton v. Holley*, 18 Ala. 408; *Bradish v. Gibbs*, 3 John. Ch. 523; *Holman v. Perry*, 4 Met. 492. And see as to the binding force of a defective settlement to the wife's separate use upon which the parties have acted during coverture, *Emery v. Neighbor*, 2 Halst. 142.

² Schoul. Hus. & Wife, §§ 186, 204.

³ *Supra*, § 45.

⁴ 1 Wms. Exrs. preface; appx.

⁵ *Willock v. Noble*, L. R. 7 H. L. 580, *per* Lord Chancellor Cairns.

disposition of modern times to deal with the wife's property as her separate instead of general property (encouraged still farther by the Married Women's Property Acts of 1870 and 1882), carrying inevitably with it the fuller recognition of her testamentary alienation as an incident of the *jus disponendi* in such property, which more than anything else wears down by undermining the old doctrine of a wife's incapacity to make a will in that country.¹

§ 56. **Wife's Will under Late American Statutes.** — Now to recur to the subject as the law stands to-day in the United States. In this country the great revolution which legislation has effected in the property rights of married women leaves its traces upon their testamentary privileges. Local statutes, not those alone which recognize or create a separate property in the wife, or turn her whole general property into separate property, but those relating explicitly to the wills of married women, are to be found in perhaps every State in this Union; and to keep pace with public policy, one must study the latest local enactments on this subject.² Many of these codes may be said to give the wife a right to dispose of her general property by will; but few in truth have received much judicial exposition, or, indeed, any at all. On the whole, the principles thus stated or indicated, as embodying what we may call an American policy, though not uniformly expressed in clear and unambiguous language, are that the wife, if of full age and sound mind, may devise or bequeath, by her sole will, whatever separate property, at least, the statutes secure to her; and that such will shall be valid without the joinder or assent of her husband.³ But power to cut off her husband

¹ Under the latest married women's acts, probate is now granted in England to the will of a married woman in the ordinary form, without any exception or limitation. *Smart v. Tranter*, 40 Ch. D. 165; 11 P. D. 169; 12 P. D. 137. See *Smart v. Tranter*, ib. as to the procedure now required, where a husband disputes the capacity of his wife to make a will.

² See Schoul. Hus. & Wife, appendix;

citation of Codes, in 1 Jarm. Wills, 38, Bigelow's note; Stimson's Am. Stat. Law, § 6460.

³ The language of these local statutes is sometimes restricted to the wife's "separate" property; in other States the word "separate" is not employed. Some States use the word "devise" and omit the word "bequeath," thus suggesting (though so strained and unnatural

by her sole will is restricted in some States.¹ The latest legislation on the subject (much of which bears date in the several States not earlier than 1873) has a tendency to confer independent testamentary powers upon the wife without qualification of terms as to her property and apart from her husband's concurrence;² in fact, to place spouses of either sex, if it be morally possible, upon the same equal plane of holding and disposing capacity.

Property which was not really the wife's in her own right, but the husband's, at the time of her death, cannot, of course, be the subject of her devise or bequest;³ nor that which vests at once in him upon her death, by the rule of survivorship.⁴ But the husband's joinder or other expression of assent should make his wife's will valid and conclusive both against him and his creditors.⁵

§ 57. **The Same Subject.**—In some States the capacity of married women to execute a valid will seems to have been conferred by implication; in others clearly and expressly; and the latest enactments usually confer the capacity in broad and positive terms. Much latitude is afforded, moreover, in discussing whether the legislature meant to confer testamentary capacity as to property of the wife subject to the husband's old marital rights, or regardless of them; and this involves the further inquiry, what is taken to be the wife's separate property, how greatly local legislation may have enlarged equity rules in this respect, and whether, in a word, all her

an interpretation would not be likely to prevail) whether the legislature meant that the wife could dispose of her lands, but not of her chattels. Other differences will be observed by minute comparison of these codes.

¹ In Massachusetts it is provided that the wife cannot deprive her husband of more than one-half her personal estate without his consent in writing. A statement of this consent upon the instrument appears necessary. *Smith v. Sweet*, 1 Cush. 470. In other States the restriction applied to the wills of either spouse

is a corresponding one. Some legislatures have manifested special hostility to the husband's influence over his wife's disposition.

² See *Schull v. Murray*, 32 Md. 9; *Noble v. Enos*, 19 Md. 72; *Stoutenburgh v. Hopkins*, 45 N. J. Eq. 890; *Knox's Estate*, 131 Penn. St. 220.

³ *Alsop v. McArthur*, 76 Ill. 20; *Vreeland v. Ryno*, 26 N. J. Eq. 160.

⁴ *Stroud v. Connelly*, 33 Gratt. 217.

⁵ *Beals v. Storm*, 26 N. J. Eq. 372; *McBride's Estate*, 81 Penn. St. 303.

own property may not at length have been placed under her general power of disposition. Statutes of Vermont giving married women power to devise their real estate by last will and testament have received a liberal interpretation as to personalty, because equity jurisdiction in that State gave a liberal scope to their general dominion over separate property.¹ But in States which draw the doctrine of separate use from local legislation rather, and whose legislation proceeds with reserve, a more stringent rule of interpretation is enforced on a husband's behalf.²

This whole difficult subject has as yet received but little attention in the courts, though much from the legislature.³ But there are already some decisions sustaining the wife's right to devise or dispose by her will, duly executed, of real estate held to her sole and separate use;⁴ not to add, of her general lands, as well as of personal property. And she may even, in certain States, cut off her husband's right of curtesy by observing the statute formalities of execution; in Massachusetts and other States, for instance, by a will executed with her husband's written assent;⁵ in Illinois, if not under various codes, without such assent.⁶ And in respect to cur-

¹ See *Caldwell v. Renfrew*, 33 Vt. 213; *Holmes v. Holmes*, 27 Vt. 765.

² In *Compton v. Pierson*, 28 N. J. Eq. 229, the court treated the wife's right of testamentary disposition as matter for strict construction. And see *Johnson v. Sharp*, 4 Cold. 45, to the same effect; *Hickman v. Brown*, 88 Ky. 377.

³ In Virginia, Maryland, and the Southern Atlantic States generally, as well as Alabama, the doctrine of the wife's testamentary capacity seemed, until very recently, to be founded upon the earlier English cases. But in these and some other States which borrow largely from the chancery jurisprudence of England, perhaps the wife would have been allowed to devise and bequeath property duly settled to her separate use, or to execute a power as the case might be. See *Burton v. Holley*, 18 Ala. 408; *Porcher v. Daniel*, 13

Rich. 369; *Michael v. Baker*, 12 Md. 158. It has been perceived that this right of testamentary disposition, as incidental to the wife's beneficial enjoyment of her separate property, has been but gradually conceded in England, and that the beneficial rule was supposed for a long time to apply to her personal estate simply. *Supra*, § 51.

⁴ *Albrecht v. Pell*, 18 N. Y. Supr. 127; *Emmert v. Hays*, 89 Ill. 1.

⁵ *Sanborn v. Batchelder*, 51 N. H. 426; *Silsby v. Bullock*, 10 Allen, 94; *McBride's Estate*, 81 Penn. St. 393. Presumably, under such statutes, a wife cannot cut off her husband's curtesy without his consent, where curtesy is still a recognized legal interest. 132 Penn. St. 533. See *Middleton v. Steward*, 27 N. J. Eq. 293.

⁶ *Pool v. Blakie*, 53 Ill. 495. And see *Cavanaugh v. Ainchbacker*,

tesy and bequests in lieu thereof, the husband may, in some States, be put to his election, as the widow has been in respect of her dower.¹

§ 58. **Wife's Will under the Civil Law; Present Tendency to Conjugal Equality.**—It is well understood that, by the Roman civil law, a married woman possessed the same testamentary capacity in all respects as a *feme sole*.² And such is the law in France, Holland, Spain, and the European countries generally.³ In Scotland the wife is permitted to bequeath her share of the common goods, even without the husband's assent.⁴ The early policy of England as to the wills

36 Ga. 500; *Stewart v. Ross*, 50 Miss. 776.

There are various States where, under statutes not the most recent, the wife's will of property settled to her separate use has been allowed to operate by way of appointment. *Buchanan v. Turner*, 26 Md. 1; *Porcher v. Daniel*, 13 Rich. 349. See § 64, *post*. And of course her will, made by permission of her husband, where the same is duly admitted to probate, *supra*, § 49. In Kentucky, as the code stood some years ago, while a married woman's will was to be restricted in operation to such estate as the law authorized her to dispose of by will, and the conclusiveness of a probate judgment was regulated accordingly, there was a liberal disposition manifested to treat land belonging to a married woman who lived apart from her husband without blame on her part, as so far her separate estate that she might dispose of it by will. *Mitchell v. Holder*, 8 Bush. 362; *Hiram v. Griffin*, 8 Bush. 262.

Independently of late statutes conferring an express capacity, the older States agree that a married woman cannot devise lands not held in her sole right. *Osgood v. Breed*, 12 Mass. 525; *Taber v. Packwood*, 2 Day, 63; *West v. West*, 10 S. & R. 446; *Marston v. Norton*, 5 N. H. 205; *Newlin v. Freeman*,

1 Ired. Law, 514. But the Ohio courts many years ago decided that under a State enactment, giving "every male person aged twenty-one years or upward, and every female aged eighteen years or upward" the power to devise property, a married woman could make a valid will to pass her real estate. *Allen v. Little*, 5 Ohio, 65. This was the case of a married woman living apart from her husband. In New York a married woman might formerly make a valid will under the written authority of her husband; but the right was afterwards taken away. Then, under a law of 1849, a married woman might devise real and personal property, and by a later enactment the right to make a will was expressly given her in liberal terms. *Moehring v. Thayer*, 1 Barb. Ch. 264; *Wadhaus v. Am. Home Missionary Society*, 12 N. Y. 415; *White v. Wager*, 25 N. Y. 328; *Albrecht v. Pell*, 18 N. Y. Supr. 127.

¹ *Clarke's Appeal*, 79 Penn. St. 376; *Schoul. Hus. & Wife*, § 442; *Huston v. Cone*, 24 Ohio St. 11. For the statute rights of a husband under a devise by his wife without his consent, see 152 Mass. 414.

² 2 Bl. Com. 497.

³ 4 Burge Col. & For. Laws, 326.

⁴ 4 Burge Col. & For. Laws, 328.

of married women seems in truth peculiar to that country. For Voet and other publicists have declared that, although the wife should not be allowed to make a contract without the consent of her husband, yet she ought to be permitted to make a will, because it does not take effect until the marital authority has ceased.¹ And the obvious tendency at present in England and the United States is to emancipate the wife from her ancient disabilities in that respect; notwithstanding which the restriction seems a wise one, that neither spouse shall utterly deprive the other of the usual and legal distributive rights at a capricious discretion.²

§ 59. **Re-Execution of Will after Coverture; Expectant Property, etc.** — In England, before the present English statute, 1 Vict. c. 26, went into operation, a widow might, without any formal republication, recognize her will made during coverture or one made by her before her marriage, and so give it full validity.³ But this rule is changed from January, 1838, by force of that statute; and republication must now be in the particular mode pointed out by the statute, tantamount to

¹ Voet, Sande & Rodenb. cited 4 Burge Col. & For. Laws, 326. We may understand, therefore, why the Louisiana Code permits the wife to make her testament without the authority of her husband. La. Code, art. 132. And in other Southwestern States, under the community system, the wife's right of testamentary disposition is likewise to be found. In Mississippi this right has been long favored; nor is it abridged by construction of the married women's acts. *Lee v. Bennett*, 31 Miss. 119. In California the statute gives the wife power to dispose of all her separate estate without the concurrence of her husband, but her will must be attested, witnessed, and proven after the ordinary manner of wills. It cannot be said in any of these States that the doctrine of the wife's testamentary capacity was borrowed entirely from the English common law, or underwent corresponding modifications, though the final results at

this day are found to be quite similar; and statutes enacted since 1870 conform to the general American rule. On our Southwestern frontier, indeed, as a result of the mingled influence which first moulded these States, the civil and common law systems of jurisprudence are found to-day inseparably blended.

² The argument which applies in favor of a widow's election to decline the provisions of her husband's will should *vice versa* be available to a husband. Either husband or wife as towards one another may prove too generous or else too niggardly, if left to an unfettered discretion, such are the perils of a life companionship; and this the new statutes will probably in time demonstrate. See *Dickinson v. Dickinson*, 61 Penn. St. 401.

³ 1 Wms. Exrs. 55; *Miller v. Brown*, 2 Hagg. 209; 3 Add. 264; *Long v. Aldred*, 3 Add. 48.

re-execution, and not by parol.¹ Hence a mere signature by herself and other parties as witnesses, the testatrix saying nothing about the reason of her signing, and making no request for the others to sign as witnesses, is held not to amount to a republication, and the will fails in consequence to operate.² Nor can the husband's parol assent during coverture be said to give the will efficiency afterwards without a formal republication, if the husband dies before the wife.³

As to expectant property not vesting in the wife until after her husband's death, she ought to re-execute her will upon his decease, or else make a new one.⁴ So in other respects as affecting property afterwards acquired by her under his will. For as to such property she was intestable during coverture.

§ 60. **Devise or Bequest to the Husband; his Marital Influence.**—There can be little doubt of the reluctance with which courts of equity sustain devises from the wife to her husband. For the long-established policy of our law, though favoring, to be sure, the husband's inheritance of his wife's personalty, casts the descent of her lands upon those of her own blood. There are decisions to the effect that the husband cannot become the gainer, or have his marital rights extended, by his wife's testamentary disposition of her lands. But they turn rather upon statutory construction than principle.⁵ In New York the Married Women's Act of 1849 gave the wife power "to convey and devise real and personal property" "as if she were unmarried"; and it was held that, notwithstanding these words, a deed executed by a wife, in contemplation of death, to her husband, in good faith and voluntarily, was wholly

¹ Wollaston, *Re*, 12 W. R. 18; 1 Wms. Exrs. 55; Willock v. Noble, L. R. 7 H. L. 580; Graham, Goods of, L. R. 2 P. & D. 385.

² Dunn v. Dunn, L. R. 1 P. & D. 277. Bilke v. Roper, 45 Ch. D. 632 (1890), carries that principle still farther. And see *post*, Part IV., as to Republication.

³ Willock v. Noble, L. R. 7 H. L. 580, 597; *supra*, § 48.

In a recent Kentucky case, the adoption and recognition by the widow of a will made by her during coverture was regarded sufficient without a re-execution. Porter v. Ford, 82 Ky. 191.

⁴ Willock v. Noble, L. R. 7 H. L. 580; Scammell v. Wilkinson, 2 East, 556.

⁵ White v. Wager, 25 N. Y. 328; Morse v. Thompson, 4 Cush. 562; Wakefield v. Phelps, 37 N. H. 295; Hood v. Archer, 1 McCord, 225.

ineffectual.¹ On the other hand, the wife's bequest of her *choses in action* to her husband has been upheld in more than one State.²

Wills of married women unduly obtained through the marital influence and authority of their husbands, are of course invalid, though the case should fall within one of the exceptions to the wife's general incapacity.³ So if a wife, having power to dispose of property by her will, makes her will, and afterwards destroys it by the compulsion of her husband, it may be established afterwards, on due proof of the compulsory destruction, and of its contents and execution.⁴

But in the analogous instance of the wife's appointment to her husband, it has been held that the circumstances that the deed had been prepared by her husband's solicitor, that it had not been read over at the time of the execution, and the evidence of one of the attesting witnesses that she was agitated and distressed at the time of the execution and signed it in a reluctant manner, will not be sufficient to invalidate the instrument.⁵ The wife's will or appointment in favor of her husband may be revoked as in other cases.⁶

§ 61. **Husband's Agreement as to Wife's Testamentary Disposition of her Lands.**—A married woman, being desirous of making a disposition of her real estate, to take effect after her decease, united with her husband in the execution of a deed of the same to a trustee, authorizing him to make a sale thereof, and out of the proceeds to pay certain sums to particular individuals, and the remainder to her legal representatives. The husband received the deed after its execution, upon his express promise to deliver it to the grantee, at his wife's decease, if that should occur before his own. Upon her death before the husband, a court of equity decreed the

¹ This was no will. *White v. Wager*, 25 N. Y. 328.

² *Caldwell v. Renfrew*, 33 Vt. 213; *Burton v. Holly*, 18 Ala. 408.

³ *Marsh v. Tyrrell*, 2 Hagg. 84; 2 Hagg. 179; 1 Wms. Exrs. 60.

⁴ *Williams v. Baker*, Mss., cited 1 Wms. Exrs. 60.

⁵ *Nedby v. Nedby*, 11 E. L. & Eq. 106. At the same time the court admitted that such deeds should be regarded with jealousy and that the circumstances of their execution ought to be closely scrutinized.

⁶ *Eustace, Goods of*, L. R. 3 P. & D. 183.

delivery of the deed to the grantee, on the ground that the title to such estate had vested in him.¹

§ 62. **Mutual Wills of Husband and Wife.**—It is held in Pennsylvania, that where husband and wife had wills prepared giving their property to one another, but each by mistake signed the other's will, and the husband afterwards died, the legislature could pass no subsequent law to reform his will; inasmuch as the right of his heirs became vested on his death as an intestate.² Joint or mutual wills by husband and wife are permitted in Texas.³

§ 63. **Wife's Gift Causa Mortis.**—The same principles which regulate the wife's testamentary disposition of her personal property should regulate her gift *causa mortis* likewise.⁴ Therefore it is held that the wife's gift of any of her several chattels during her last illness, and in expectation of death, is, like her will, valid on principle only by the assent of her husband.⁵ On the other hand, the late married women's acts which enlarge the wife's right to hold and dispose of property as her own, and impair the ancient coverture title of the husband, are in some States given the contrary effect; and in Massachusetts, a wife is permitted to dispose by gift *causa mortis* of specific articles of her separate personal property without her husband's consent, and regardless of the statute restrictions still placed upon her testamentary capacity.⁶

¹ Woodward v. Camp, 22 Conn. 457.

² Alter's Appeal, 67 Penn. St. 341.

³ Wyche v. Clapp, 43 Tex. 543. See *post*, Part V., as to joint or mutual wills in general.

⁴ See on the subject of gifts *causa mortis* generally, 2 Schoul. Pers. Prop. 2d Ed. §§ 135-198.

⁵ Jones v. Brown, 34 N. H. 439. See Kilby v. Godwin, 2 Del. Ch. 61, as to the donation of a wife's separate property.

⁶ Marshall v. Berry, 13 Allen, 43. Says Wells, J., of the gift *causa mortis*: "Although it is of a testamentary character in some of its incidents, . . . yet,

inasmuch as, by our law, an actual delivery, or some equivalent act, by the donor, in his lifetime, is necessary to its validity, we think it must be regarded as, in its essential character, a gift." This decision is to be regretted as sanctioning a practical evasion of the Massachusetts statute with regard to a wife's testamentary disposition, as against her husband. The implied conditions of revocation which accompany such gifts make the disposition so nearly ambulatory, like that of a will, that the policy of the law should not differ in the two cases, except to discountenance such gifts as much as possible. The gift

There appears no impolicy in making the husband the donee, wherever the wife's gift *causa mortis*, confined to personal property, is sustainable at all. It was decided in Vermont, some years ago, that a married woman might give notes *causa mortis* which she held as her separate property to her husband as trustee for other persons, and thereby vest in him a good legal title as against her administrator. "In this view alone," added the court, "it seems to be needless to discuss whether the husband could be a donee *causa mortis* of the wife; and yet on principle it is quite difficult to assign a cogent or plausible reason why he might not be."¹ On the other hand, the husband may set up his antenuptial contract with his wife in reference to certain property, so as to prevent her gift *causa mortis* to others from taking effect to his prejudice.²

§ 64. **Wife's Execution of a Testamentary Power.**— Finally, it may be observed that, both in England and America, a married woman may make a special testamentary disposition of real or personal estate under a power, even where her general testamentary capacity is by law denied or restricted. There are many decisions found to this effect, in England particularly.³ A wife may have power to appoint certain

causa mortis as sanctioned in modern times is liable to the worst objections ever urged against the policy of informal wills; and it is highly desirable that such gifts be either restrained by legislation or discarded altogether. See 2 Schoul. Pers. Prop. §§ 197, 198.

¹ Caldwell v. Renfrew, 33 Vt. 213.

² Lawrence v. Barrett, 2 Allen, 36.

³ 4 Kent Com. 506; 2 ib. 170, 171; Heath v. Withington, 6 Cush. 497; West v. West, 10 S. & R. 446; 2 Perry Trusts, § 668; Dunn's Appeal, 85 Penn. St. 94; Dominick v. Michael, 4 Sandf. 374; Hughes v. Wells, 13 E. L. & Eq. 389; Shattock v. Shattock, L. R. 2 Eq. 182; Rogers v. Hinton, 1 Phill. (N. C.) Eq. 101; 1 Wms. Exrs. 56; Ludlam, *Re*, (1890) W. N. 162. And see in general, Sudgen on Powers, c. 3.

In cases of doubt, a limited probate of the instrument may be granted. Pagley v. Tongue, L. R. 1 P. & D. 158; Richards, Goods of, L. R. 1 P. & D. 156; L. R. 1 P. & D. 319, 323. And see Trappes v. Meredith, L. R. 7 Ch. 248; Graham, Goods of, L. R. 2 P. & D. 385. English practice now requires that the wife's testamentary appointment under a power shall, in order to avail in law or equity, be presented for probate, though a different rule was formerly applied; the court, however, grants probate of such an appointment without the husband's consent, limiting it to the property comprised in the power. 1 Wms. Exrs. 56, 57; Barnes v. Vincent, 5 Moore P. C. 201.

Where a will is only an appointment under a settlement, the trustees named

property by will and not by deed, and *vice versa*.¹ And in some cases, particularly those which involve property rights in the wife's lands, the courts seem to have been misled by the similarity between separate estates and estates with a power of appointment given to the wife; and therefore to have applied the terms "devise," "will," and "appointment" somewhat indiscriminately.²

Revocation and the other incidents of ordinary wills attend *pro tanto* the wife's testamentary disposition under a power;³ which, of course, may be so extensively conferred under the trust as to embrace a considerable property, and perhaps all, in fact, of her personal property. The same formalities are not necessarily requisite in executing a power, as in disposing of separate property; but rather the terms prescribed by that power should furnish the criterion.⁴ This doctrine, however, is liable to statute modification, founded in the general policy of prescribing a uniform mode of execution and attestation for all wills. Under the English statute of wills (1 Vict. c. 26), for instance, it is expressly declared that no appointment made by will, in exercise of any power, shall be valid unless executed in the manner required for other wills; and further, that every will so executed shall, as respects execution and attestation, be a valid execution of the power, notwithstanding the power as conferred imposed additional or different solemnities of execution.⁵

do not act, strictly speaking, as executors. Fraser, Goods of, L. R. 2 P. & D. 183. Nor do the executors so-called of the will of a married woman made under a power take anything by right of representation, but merely under the power, subject to the restraints with which that power was coupled; and consequently their title cannot extend beyond the property disposed of by the disposition under the power. Tugman v. Hopkins, 4 M. & Gr. 389; 1 Sw. & Tr. 465; 1 Wms. Exrs. 59.

¹ See Harvey, *Re*, 28 W. R. 73, as to subjecting appointed funds as assets for the wife's debts.

² A wife made a will, disposing of a

fund over which she had a power, and also of a fund over which she had no power, and made her husband her executor, and he proved her will generally. It was held that as to the fund over which she had no power, the will was valid, as made with the husband's assent. Fane, *Ex parte*, 16 Sim. 406; *supra*, § 48.

³ See Harvey, *Re*, 28 W. R. 73, as to subjecting appointed funds as assets for the wife's debts.

⁴ Schley v. McCeney, 36 Md. 266.

⁵ Stat. 1 Vict. c. 26, § 10 (1837); 1 Wms. Exrs. preface; Este v. Este, 2 Robert. 351; 2 Robert. 461; appendix,

post.

CHAPTER IV.

INCAPACITY OF INSANE PERSONS IN GENERAL.

§ 65. **Will of an Insane Person Void ; Difficulty of Modern Tests.** — Any will which is the offspring of an unsound mind is void ; the broad principle of personal incapacity which is here discovered extending to all dispositions of property, all contracts, the entire management of one's own affairs. In an earlier age the incapacity of insane persons to make a will was plainly, almost brutally, announced by our jurists, the common law drawing no fine line between persons *sui juris* and those *non compos*, which latter class of beings might be found huddled together in the vocabulary as madmen, lunatics, idiots, and natural fools. The disposition was to narrow the definition of the *non compos* (for "insanity" is a gentler word than our early progenitors were accustomed to apply to such unfortunates) and thus reduce the number of those whose kinsmen should feel the reproach of a malady which bore a moral infliction to the victim. Until the latter half of the last century asylums for hygienic treatment were scarcely known. The English madhouse was a pandemonium ; scions of the rich and well-born who had lost their reason were locked up in some distant corner of the mansion ; while the common herd of lunatics and idiots were chained in cells or pens or wandered, if harmless, as vagrants. In many of our American towns the selectmen would let them out to the lowest bidder to work for a scanty and miserable subsistence. The dramatist has depicted lunatic kings and beggars of our race as baring their breasts together to the howling storm and inviting the elements to aggravate their disorder ; but it was not until George III. gave insanity in real life the prestige of royal example that the disorder began to receive tender medical treatment, and

the vulgar opinion that one who is *non compos* must remain so began to turn.¹

At the present day the drift is in quite the opposite direction; the insane are humanely cared for, and much less than formerly is the malady found incurable; but what with symptoms increased and diversified greatly in the multitude of patients whose minds have given way under the prodigious strain of our modern social responsibility; what with the inventive zeal and complexity of all modern research; we now find the tests of mental incapacity running out into the most subtle of psychological refinements.² Next, to determining the legal responsibility of the felon for his crime, nothing so draws the host of contending medical experts into our courts in these days as the inquiry whether one who has left behind him a will for his survivors to quarrel over was of sound and disposing mind when he executed it.

¹ See preface to 1 Wharton & Stillé, Med. Jur. 3d ed., where the change of sentiment among loyal Englishmen, produced by the malady of their king, is well traced out. Almost simultaneously (it is here added) the investigations of Pinel took place in Paris, which resulted in the separation from the common prison in that city a separate asylum for healment of the insane based on wise sanitary regulations.

The general reader recalls readily the delineation of Macbeth, Lear, and Hamlet, as embodying in our earlier dramatic fiction, under a master's hand, the idea of royal insanity, derived from crime on the one hand and dotage or youthful misfortune on the other. But in historical England, robust health and rude energy had hitherto carried affairs almost without interruption; and by no race of mankind has the inhumane but natural rule of "the survival of the fittest" been to this day worked out more vigorously than by the Anglo-Saxon. As to the treatment of the English maniac in the earlier days of the Georges, one need only turn over

Hogarth's pictures in "The Rake's Progress."

² The influence of Rousseau's works (1760-1764) in converting people from the old belief that insanity was a crime to an opinion too indulgent in the opposite direction; namely, that crime should be healed as insanity and provoke our curious regard and sympathy, elicits Dr. Wharton's comment in this connection. Of the modern drift of sentiment towards the insane he thus remarks: "Madness having been shown to be capable of cure, and to be a condition in itself implying no moral stigma, and insane asylums having been proved to be the places where the insane can most readily be restored to health, many persons come to be regarded by their friends and by a rightful public feeling as insane who previously would have been treated as sane. The definition of insanity, in the philanthropic mind at least, was so enlarged as to include all persons who, while not being clearly maniacs, were yet subject to mental or moral anomalies which a wise medical treatment could remove." 1 Whart. & Stillé, pref.

§ 66. **The Same Subject.** — Mental unsoundness involves, we may assume, disorder of will and feeling as well as of intellect; and hence the feebleness of volition which may subject one to the importunities, the unfair pressure, the undue influence, violent or crafty, of those about him, so as to make the will theirs and not his, and cause it to fail justly of probate on that ground, aside from the reasonableness or unreasonableness of its provisions. This is a subject of much prominence in our present connection; yet coercion might be exerted upon a sane person to a like result; and we shall postpone its discussion to that of insanity with which it is so often associated. And in dealing directly with testamentary incapacity on the ground of insanity, a topic highly interesting and important under our present law of wills, we shall take the natural order of treating first of the plainer manifestations of this incapacity, thence passing to the finer shades of mental disorder, until our investigation becomes complete.

§ 67. **Standard of Mental Incapacity in Wills as compared with Contracts, etc.** — Let us premise, however, that the same legal standard of mental unsoundness is not asserted for invalidating a will as a contract, nor for avoiding responsibility for crime as in either of these other instances. The question of "guilty" or "not guilty," of incapacity for distinguishing between right and wrong, we may dismiss at once.¹ As between contracts and wills, several eminent judges have laid it down that a man may be capable of making a will, and yet incapable of making a contract² or a deed;³ that in a sale, for example, mind is opposed to mind, and interests and efforts so antagonize that the just bearings of the whole transaction are less clearly traceable than where, under the common circumstances of a testamentary disposition, one is left free to

¹ A less degree of imbecility is necessary to invalidate a will than would be ground of acquittal from a criminal charge. *McTaggart v. Thompson*, 14 Penn. St. 149. *Cf. Kinne v. Kinne*, 1 Conn. 102.

² *Banks v. Goodfellow*, L. R. 5 Q. B. 567; *Stevens v. Vancleve*, 4 Wash. C. C. 262; *Thompson v. Kyner*, 65 Penn. St. 368; *Brinkman v. Ruegesick*, 71 Mo. 553; 83 Mo. 175.

³ *Kerr v. Lunsford*, 31 W. Va. 659.

act upon his own perceptions merely.¹ As a general proposition, less capacity, it is said, will suffice for making a will than to transact ordinary business.² All this presupposes, of course, that the testator's mind has been left free to operate without constraint or importunity of any sort from interested parties. For, surely, no class of property dispositions is so liable to close, secret, and sinister influences while the owner is mentally failing as the present; and this more particularly, where one's disposing act dates at his last illness. Nor should it be forgotten that a sale or other single transaction affects usually a small portion of one's estate, while a testament generally embraces the whole by a sweeping transfer; that if minds antagonize in ordinary business, that antagonism may serve to recall or modify afterwards, or, at all events, to explain the mutual intent where injustice ensues; whereas the testamentary act once operating cannot be revoked or altered; its motives are outside the scope of one's own explanation, and the injustice, if any be done, is forever beyond the reach of correction. Furthermore, the testamentary act is that of an individual, and only imperative when one wishes to break the common rule of succession, and disturb the presumptive rights of spouse and kindred surviving him; whereas business transactions *inter vivos* involve reciprocal interests which the State does not regulate and the parties themselves cannot dispense with; so that the inquiry may here, if not elsewhere, be pertinent, how far should courts go in upholding an unjust disposition made by one of doubtful capacity in derogation of the public policy announced in the statutes of descent and distribution?³

¹ *Converse v. Converse*, 21 Vt. 168. But in some cases it has been held that the capacity requisite for making either will or contract is precisely the same. *Coleman v. Robertson*, 17 Ala. 84.

² *Converse v. Converse*, 21 Vt. 168; *Harrison v. Rowan*, 3 Wash. C. C. 580.

³ As opposed to the common expression that a less degree of capacity is requisite for making a will than a contract may be cited the opinion of Sir J.

Hannen (1873) in *Boughton v. Knight*, L. R. 3 P. & D. 64, which he explains in ib. 72 note. "It has been erroneously supposed," he says in the latter passage, "that I said that it requires a greater degree of soundness to make a will than to do any other act. I never said and I never meant to say so. What I have said, and I repeat it, is, that if you are at liberty to draw distinctions between different degrees of soundness of

We should conclude, therefore, that as between contract and testamentary capacity, it is the fairer mode to contrast the standards, when the contrast becomes needful at all, by making the comparison that of differing standpoints rather than of differing degrees from a common standpoint.¹

mind, then, whatever is the highest degree of soundness is required to make a will. . . . From the character of the act it requires the consideration of a larger variety of circumstances than is required in other acts, for it involves reflection upon the claims of the several persons who, by nature, or through other circumstances, may be supposed to have claims on the testator's bounty, and the power of considering these several claims, and of determining in what proportions the property shall be divided amongst the claimants; and, therefore, whatever degrees there may be of soundness of mind, the highest degree must be required for making a will." The chief value of these observations is to correct against that habit of mind which compares capacity for making a will with capacity for other transactions, as though it were a matter of degrees marked off upon one register.

In Louisiana it has been distinctly asserted from the bench that testaments are more easily avoided than contracts on the ground of unsoundness of mind; though here perhaps is felt the influence of the civil law which set aside unnatural or inofficious testaments more freely than does our common law. "This distinction," it was later observed, "applies to such matters as those of notoriety and interdiction and not to the amount of intellect required in a testator. So far as the latter is concerned, a will may well be made by any mind which has the soundness and strength necessary to endure the conflict involved in the making of a bargain. It would be unreasonable to require that a testator should have more mental vigor and a more lucid memory than a person who makes a contract." *Chandler v. Bar-*

rett, 21 La. Ann. 58, 59, commenting upon *Aubert v. Aubert*, 6 La. Ann. 106.

¹ It is more safely said that if a person has sufficient understanding and intelligence for transacting his ordinary business, he is sufficiently capable of making a will; and to such a test testamentary capacity is often referred in dealing with witnesses who testify to the point of mental unsoundness. This statement puts the contract and testamentary capacity on a co-equal rather than unequal footing. See *Benoist v. Murrin*, 58 Mo. 307; § 83, *post*, as to "sound and disposing mind," etc. Various Illinois cases support this statement of the court. In *Meeker v. Meeker*, 75 Ill. 260, 262: "It is a rule of law that a person who is capable of transacting ordinary business is also capable of making a valid will. It is not required that he shall possess a higher capacity for that than for the transaction of the ordinary affairs of business. A man capable of buying and selling property, settling accounts, collecting and paying out money, or borrowing or loaning money, must usually be regarded as capable of making a valid disposition of his property by will." See 117 Ill. 317; 121 Ill. 376; also 83 Mo. 175. In Illinois (as in some other States) statute expression influences somewhat the ruling of the courts as the *quantum* of mental capacity. 130 Ill. 466.

But it is still preferable, we think, to treat testamentary capacity so far as possible, as something furnishing a distinct standard from that of general contract capacity, and requiring mental soundness to be tested accordingly; our true criterion at present being, not whether one was capable of this or that transaction *inter vivos*, but whether he

§ 68. **General Standard of Testamentary Capacity stated.**—All other things being equal, the will a fair one of itself, properly executed, and neither undue influence nor insanity appearing to have operated in its composition, the courts are disposed to sustain it. Hence the comparison or similitude of testamentary with contract capacity which we find so frequently asserted in favor of the instrument propounded as the last will. It is only when one's insanity renders him plainly incapable of acting rationally in the ordinary affairs of life and the disposition in question is the fruit of that incapacity, that the difficulty becomes readily solved by setting his will aside. Mental unsoundness which falls short of this, namely that which bodily infirmity, distress, the decay of advancing age, habitual drunkenness, or some physical defect or peculiarity of character engenders, does not produce a conclusive incapacity to make a will. For as a general proposition, if the testator possesses mind sufficient to understand without prompting the business about which he is engaged when his will is executed, the kind and extent of the property to be willed, the persons who are the natural objects of his bounty and the manner in which he desires the disposition to take effect, his will is a good one.¹ To quote Cockburn, C. J., it is admitted on all hands that in these varieties of

was capable of making a will. Thus, we shall see in the chapter on monomania, *post*, that one may be capable of transacting complicated business which involves much power of intellect, and yet be under some insane delusion which vitiates the will he has executed.

¹ *Delafield v. Parish*, 25 N. Y. 10; *Thompson v. Kyner*, 65 Penn. St. 365; *Higgins v. Carlton*, 28 Mo. 115; 39 Penn. St. 191; *Roe v. Taylor*, 45 Ill. 485; *St. Leger's Appeal*, 34 Conn. 435; *Brown v. Riffin*, 94 Ill. 560, 569; *Lewis's Will*, 51 Wis. 101; *Wilson v. Mitchell*, 101 Penn. St. 495, 502; *Shaver v. McCarthy*, 110 Penn. St. 339; *Cline v. Lindsey*, 110 Ind. 337; 120 Ind. 463; 117 Ill. 317; *Delaney v. Salina*, 34 Kan. 532; *Prather v. McClelland*, 76 Tex.

574; *Kerr v. Lunsford*, 31 W. Va. 659; *Thompson v. Ish*, 99 Mo. 160; *McCoon v. Allen*, 45 N. J. Eq. 708. Whether the testator was or was not, at the date of execution, able to understand and reasonably to transact the ordinary business of life, is no doubt pertinent to the inquiry. See *Brown v. Riffin*, 94 Ill. 560, 569. But the precise point of inquiry is an understanding of the particular business, namely of the testamentary disposition. Too much stress should not be laid on a comparison between one's contemporaneous and former business habits. *Brown v. Riffin*, *supra*.

Lord Cranworth has justly said of testamentary incapacity in *Boyse v. Rossborough*, 6 H. L. Cas. 45, that the difficulty to be grappled with arises

mental unsoundness as distinguished from mental derangement, "though the mental frame may be reduced below the ordinary standard, yet, if there be sufficient intelligence to understand and appreciate the testamentary act in its different bearings, the power to make a will remains."¹

It follows that one who is incapable at the moment of comprehending the nature and extent of his property, the disposition to be made of it by testament, and the persons who are or should be provided for, is not of a sound disposing mind. And if this mental condition be really shown to exist, the will must fail, even though he may have a glimmering knowledge that he is endeavoring to make a testamentary disposition of his property.²

§ 69. The Same Subject: More Deference to Testator in Earlier Cases. — It is here to be observed that some of the earlier cases have laid down the rule of testamentary capacity with much more subservience to the purported expression of one's last wishes. They seem to have assumed that there must be a total want of understanding in order to render one intestable; that a court ought to refrain from measuring the capacity of a testator, if he have any at all; and that unless totally deprived of reason and *non compos mentis*, he is the

from the circumstance that the question is almost always one of degree. "There is no difficulty in the case of a raving madman or a drivelling idiot in saying that he is not a person capable of disposing of property; but between such an extreme case and that of a man of perfectly sound and vigorous understanding there is every shade of intellect, every degree of mental capacity. There is no possibility of mistaking midnight for noon, but at what precise moment twilight becomes darkness is hard to determine."

¹ *Banks v. Goodfellow*, L. R. 5 Q. B. 567. And see 1 Whart. & Stillé Med. Jur. §§ 19, 32; Shelf. Lunacy, 277, 278; 1 Redf. Wills, 123-127.

Lord Kenyon has said of the testator's

capacity: "He must have that degree of recollection about him that would enable him to look about the property he had to dispose of, and the persons to whom he wishes to dispose of it." *Greenwood v. Greenwood*, 3 Curt. App. 2, 30. And see *Erschine, J.*, to the effect that he must have capacity to comprehend the extent of his property, and the nature of the claims of others, whom, by his will, he is excluding from all participation in that property. *Harwood v. Baker*, 3 Moore P. C. 282.

² *Young v. Ridenbaugh*, 67 Mo. 574; *Wilson v. Mitchell*, 101 Penn. St. 495, 502; 110 Penn. St. 339; *Campbell v. Campbell*, 130 Ill. 466; 6 Dem. (N. Y.) 123; *Chrisman v. Chrisman*, 16 Oregon, 127.

lawful disposer of his own property, so that his will stands as a reason for his actions, harsh as may be its provisions.¹ This ascribes altogether too great sanctity to the testamentary act of an individual as opposed to the law's own will set forth by the statutes and founded in common sense; and it is well that the best considered of our latest cases recede from so extreme and false a standard.

§ 70. **Incapacity is more than Weak Capacity; Enfeebled Testator may make a Will.** — Notwithstanding the modern rule to be favored, we should still, however, bear in mind that incapacity is more than weak capacity; and, as already intimated, mere feebleness of mind does not suffice to invalidate a will, if the testator acted freely and had sufficient mind to comprehend intelligently the nature and effect of the act he was performing, the estate he was undertaking to dispose of, and the relations he held to the various persons who might naturally expect to become the objects of his bounty. While it is true that it is not the duty of the court to strain after probate, nor in any case to grant it where grave doubts remain unremoved and great difficulties oppose themselves to so doing,² neither is it the duty of the court to strain against probate, and impeach the will merely because it is made in old age or upon the sick bed, after the mind has lost a portion of its former vigor, and has become weakened by age or disease.³ Weakness of memory, vacillation of purpose, credu-

¹ *Stewart v. Lispenard*, 26 Wend. 255, modified by *Delafield v. Parish*, 25 N. Y. 10; *Elliot's Will*, 2 J. J. Marsh. 340; *Burger v. Hill*, 1 Bradf. 360; *Dornick v. Reichenbach*, 10 S. & R. 84. Perhaps, after all, this difference is more of *dictum* than of conclusion upon all the proof.

² *Delafield v. Parish*, 25 N. Y. 35, *per curiam*.

"If a man," says Swinburne, "be of a mean understanding (neither of the wise sort or the foolish) but indifferent, as it were betwixt a wise man and the fool, yea, though he rather incline to the foolish sort, so that, for his dull

capacity he might worthily be called *grossum caput*, a dull pate, or a dunce, such a one is not prohibited from making his testament." Swinb. pt. 2, § 4, pl. 3. The force of this somewhat brutal statement lies in a delicate and discriminating application of it.

³ *Meeker v. Meeker*, 75 Ill. 260; *Bundy v. McKnight*, 48 Ind. 502; *Duffield v. Robeson*, 2 Harring. 379; *Legg v. Myer*, 5 Redf. 628, 635; *Watson v. Donnelly*, 28 Barb. 653. Even a will somewhat unfair was upon this argument admitted to probate in *Legg v. Myer*, *supra*.

In *Delafield v. Parish*, 25 N. Y. 97,

lity, vagueness of thought, may all consist with adequate testamentary capacity, under favorable circumstances. And a comprehensive grasp of all the requisites of testamentary

the majority of the court laid down the following legal propositions: "In law, the only standard as to mental capacity in all who are not idiots or lunatics is found in the fact whether the testator was *compos mentis* or *non compos mentis*, as those terms are used in their fixed legal meaning. Such being the rule, the question in every case is, had the testator, as *compos mentis*, capacity to make a will; not, had he capacity to make the will produced. If *compos mentis*, he can make any will, however complicated; if *non compos mentis*, he can make no will — not the simplest."

These rules (which appear to be drawn somewhat from the literal expression of a New York statute) differ materially from those announced by Davies, J., in the same case, and may appear open to grave exception. In the first place, they attempt a bolder line between the sane and the non-insane than medical experience justifies. Next, they leave out of view the varied operation of insane delusion, which, as we well know at this day, might enter into one testamentary disposition but not another, so as to invalidate in the former instance only. And again, they ignore the possibility of undue influence from without, to which the wills of all feeble and weak-minded persons of wealth are so peculiarly subjected, that, unless fair and natural in their provisions, they ought always to be viewed with suspicion and only admitted upon fair proof that under all the circumstances the identical instrument as presented was the testator's own will, and not what others, with sinister ends in view, made for him. Far from true appears the abstract proposition that a testator who can make one will can make any will; nor to this writer does it seem that the community would suffer, if, after all, the court of probate, in every case of doubt-

ful capacity, of doubtful intellect and volition in the testator, permitted the justice or injustice of the particular disposition to turn the scale.

To charge a jury to find whether a testator is "crazy" or not is not in good form, and the word is quite inappropriate in such an issue.

Calvin, Surrogate, in *Townsend v. Bogart*, 5 Redf. 93, 105, suggests that the use of the term *compos mentis*, which is sometimes made the standard of testamentary capacity as meaning "sound mind," will often mislead. And he commends the careful expression of the court in *Bundy v. McKnight*, 48 Ind. 502. Here it is observed that the law does not undertake to test a person's intelligence, and define the exact quality of mind and memory which a testator must possess to authorize him to make a will; yet it does require him to possess a mind to know the extent and value of his property, the number and names of the persons who are the natural objects of his bounty, their deserts in reference to their conduct and treatment towards him, their capacity and necessities; that he shall have sufficient active memory to retain all those facts in his mind, long enough to have his will prepared and executed; and if this amount of mental capacity is somewhat obscure or clouded, still the will may be sustained. "There is no country in the world in which the law permits a larger exercise of volition in the disposal of property after death than in England" [and it might be added in the United States, where the English law is followed]. "But it requires as a condition, that this volition should be that of a mind of natural capacity, not unduly impaired by old age, enfeebled by illness or tainted by morbid influence. Such a mind the law calls 'a sound and disposing mind.'"

knowledge in one review appears unnecessary provided the enfeebled testator understands in detail all that he is about and chooses rationally between one disposition and another.¹

§ 71. The Same Subject: the Testator's Mind should act without Prompting.—In the important case of *Delafield v. Parish*, Davies, J., of the New York Court of Appeals, after announcing the fairer rule of testamentary capacity above set forth, spoke of the testator's mind as acting without external pressure wherever it acted properly. "The testator must," he says, "have sufficient active memory to collect in his mind, without prompting, the particulars or elements of the business to be transacted, and to hold them in his mind a sufficient length of time to perceive at least their obvious relations to each other, and be able to form some rational judgment in regard to them";² and we may add, long enough to have been able to dictate or write out his wishes, and to execute with all due formalities.

§ 72. The Test of Testamentary Capacity should be referred to the Particular Instrument and Transaction.—When we come to examine in detail the various classes of cases where sanity and the capacity to make a will have been in controversy, the general doctrine, as above stated, will more clearly appear

Sir J. P. Wilde in *Smith v. Tebbett*, L. R. 1 P. & D. 398, 400.

¹ *Wilson v. Mitchell*, 101 Penn. St. 495, 502; approved in 110 Penn. St. 339; *Jackson v. Hardin*, 83 Mo. 175; *Delaney v. Salina*, 34 Kan. 532. It is not necessary that the testator should know the number and condition of his relatives and their claims upon his bounty, nor that he should understand the reason for giving or withholding his bounty from any such relatives. *Spratt v. Spratt*, 76 Mich. 384. Nor that he should remember the names of absent relatives. *Kramer v. Weinert*, 81 Ala. 414. Nor that he should call to mind every item of his property and the value of each. *Reichenbach v. Ruddach*, 127 Penn. St. 564. Nor, of course, that he

should understand the precise legal effect of the provisions he makes, for on such points the most sane of testators may fail. 21 Mich. 141, 142. Nor that one shows no failure of memory and weakening powers, though instances on this point might be pertinent as proof. *Richmond's Appeal*, 59 Conn. 226; 45 N. J. Eq. 890.

It is misleading and too sweeping to rule that if a testator's mind was "unsound" he could not make a valid will. *Durham v. Smith*, 120 Ind. 463; *Reichenbach v. Ruddach*, 127 Penn. St. 564.

² *Delafield v. Parish*, 25 N. Y. 9, affirming *Parish v. Parish*, 42 Barb. 274. And see 76 Mich. 384.

with its qualifications. We shall find that the criterion in such cases is best taken as *sui generis* and not referred to the standard of general contract capacity; though unquestionably the habit and capacity of any testator to actively transact his ordinary business and make his own contracts furnish strong evidence of the capacity at issue.¹ The vital question in any such case should be, whether upon all the evidence the particular instrument propounded for probate was or was not under all the circumstances the real testamentary disposition (and the last one, of course) of a mind neither deranged in producing it, nor operating under stress of error, fraud, or undue influence.² And to decide this question properly requires a careful view of the particular case in all its bearings without too rigid an adherence to any general maxims of capacity. The time and place to be regarded in determin-

¹ The capacity of making and taking care of one's property has been held evidence of his testamentary capacity in a particular case, but not conclusive evidence. *Gass v. Gass*, 3 Humph. 278. "But it is proper to remember," observes Judge Redfield, "that the capacity to make and take care of property is more satisfactory evidence of testamentary capacity, than the want of that power would be of due want of testamentary capacity." 1 Redf. Wills, 127. The circumstance that the testatrix had badly managed a large estate which she inherited so that much of it was wasted is no proof of testamentary incapacity. *Hall v. Hall*, 17 Pick. 373. One may have capacity to make a will, though unable to manage his estate. *Brinkman v. Rueggessick*, 71 Mo. 553. See footnotes in previous sections, §§ 68, 70.

² In 1 Redf. Wills, 131, 132, after commending Swinburne's observations upon this general subject of capacity, the distinguished author shows his own preference for bringing questions of this character to the test of a simple inquiry. The issue he states in these words: "Whether the document claimed to be the will of the testator, was really the

product of his own free will and action, or that of others; in short, whether they regarded it as the *will of the testator or the act of some other person or persons?*" It is submitted, however, that such a statement leaves out of view the hypothesis that a testator's will may be his own uninfluenced act and not the act of others in any sense, and yet be the offspring of an insane mind.

Error, fraud, or undue influence, should be shown by those alleging it.

The common rules of testamentary capacity are criticised in *Irish v. Newell*, 62 Ill. 196. The best form (it is here said) in which the question of testamentary capacity can be stated to the jury is, whether the testator's mind and memory were sufficiently sound to enable him to know and understand the business in which he was engaged at the time he executed the will; and in determining the question the competency of the mind should be judged of by the nature of the act to be done, from a consideration of all the circumstances of the case. See more fully, c. 9, *post*.

ing the validity of the will should be essentially the time and place of its execution.¹

§ 73. **Testamentary Capacity Consistent with Execution of a Will in Extremis.**—The will of a dying person, made very close to the point of death, requires a careful scrutiny of the surrounding circumstances which bear upon capacity and free volition. It is certainly a very dangerous period for taking into mind for the first time the arrangement of a complex disposition of property, or even for executing intelligently. But, after all, the question of sanity or insanity, freedom of will or coercion from without, is, as in other cases, the material one to be decided upon all the facts. Where the act of execution *in extremis* relates not to a will just framed in the mind, but to one which has reduced to writing the results of the testator's previous deliberation and direction, at an earlier stage of illness, it deserves peculiar indulgence, when drafted correctly and then executed in due form. Thus, in a Massachusetts case a testatrix gave directions, at 11 o'clock in the morning, how her will should be drawn up. She executed the will at 6 in the evening and died two hours after. The jury were instructed that if, at the time of dictating the will, she had sufficient discretion for that purpose, and at the time of executing it was able to recollect the particulars she had so dictated, they might find their verdict in favor of the will; and they found accordingly.²

One might be too weak physically to do more than make a mark to the instrument, and yet be mentally competent.³

§ 74. **Testamentary Capacity Consistent with Insane Delusions, etc.**—The better opinion in English and American courts, as we shall show more fully hereafter, holds that mental unsoundness, exhibited in insane delusions, or what has been loosely styled "partial insanity," does not of itself

¹ See *Kerr v. Lunsford*, 31 W. Va. N. Y. 153; *Lewis's Will*, 51 Wis. 101; 659. 130 Ill. 467; 16 Oreg. 127.

² *Hathorn v. King*, 8 Mass. 371. See ³ § 84, *post*.
also *Brown v. Riggins*, 94 Ill. 560; 39

destroy testamentary capacity necessarily, unless the will in question be the direct offspring of the delusion. Where, in other words, the delusion is altogether collateral to the disposition, the will itself is not invalidated; but where the delusion manifestly operated upon the disposition, then the will must be declared void.¹ In general our latest decisions show a positive reluctance to set aside any will on mere proof that the testator suffered from some dubious mental disorder or weakness, provided it fairly appear that the provisions of the will were not thereby affected.²

§ 75. Modes of Testing Capacity, as between Monomania and Habitual Insanity. — Where a person is laboring under such insane delusion, or what modern psychology terms monomania,³ his sanity is to be tested by directing his attention to the subject-matter of such delusion; but where a person is afflicted with habitual insanity unaccompanied by delusions, his sanity is to be tested by his answers to questions, his apparent recollection of past transactions, and his reasoning justly with regard to them and with regard to the conduct of individuals.⁴

§ 76. Effect of Insanity where a Will and Codicils are executed. — We shall see that a codicil republishes a will, if clearly referring to it, and makes the will speak from the date of the codicil, and that the same principal applies where two or more codicils are added; the practical effect being to incorporate the instruments as one testamentary disposition.⁵ Where, therefore, a will with several codicils is contested on

¹ *Dew v. Clark*, 3 Add. 79; *Banks v. Goodfellow*, L. R. 5 Q. B. 549; *James v. Langdon*, 7 B. Mon. 193; *Boyd v. Eby*, 8 Watts, 70; *Rice v. Rice*, 50 Mich. 448; *Crum v. Thornley*, 47 Ill. 192; *Dunham's Appeal*, 27 Conn. 192; *Seaman's Friend Society v. Hopper*, 33 N. Y. 619; *Pidcock v. Potter*, 68 Penn. St. 342; *Cotton v. Ulmer*, 45 Ala. 378; *Robinson v. Adams*, 62 Me. 369. There appears, however, some conflict in the English cases on this point. See *Smith v. Tebbitt*, L. R. 1 P. & D. 398; *War-*

ing v. Waring, 6 Moore P. C. 349. See c. 8, *post*, as to monomania and insane delusions.

² *Rice v. Rice*, 50 Mich. 448.

³ "Monomania" supersedes "partial insanity" as the modern term appropriate to the disorder. But it is questionable whether one term is less inexact, in a logical sense, than the other.

⁴ *Sir C. Cresswell in Nichols v. Binns*, 1 Sw. & Tr. 239.

⁵ See Part IV. *post*, as to Codicils.

the ground of mental incapacity in the maker, it is not necessary to establish capacity at the several dates when the instruments were executed; for capacity at any one date renders valid the act then done and all the preceding acts republished by it.¹

§ 77. **Unjust and Foolish Wills viewed with Suspicion.**—Notwithstanding the broad principle which maintains testamentary capacity, it is generally found in practice that a will which is partial and unjust in its provisions, absurd, or clearly devoid of natural duty or affection, finds no ready support in the courts. Such wills are not, indeed, absolutely void; but their execution is regarded with jealousy and suspicion. The spiritual tribunals in early times, following the Roman law of inofficious testaments,² made little compunction of setting senseless wills aside, or as Swinburne very strongly expressed it, “if there be but one word sounding to folly.”³ Foolish words, foolish phrases, cannot in these days, however, be said to invalidate any will at the Anglo-Saxon law; and it is doubtful whether they ever did more than furnish as against such an instrument a presumption which more positive evidence of intention ought by the present rule to fortify.⁴ We have already seen that discrimination by will against the surviving spouse or child is to some extent guarded against, and not wholly by construction;⁵ but the English law does not follow the Roman in avoiding such wills peremptorily as the offspring of incapacity, nor even so as to prevent one absolutely from disinheriting his own offspring.⁶ On the contrary, if a testator be legally competent to make his will, and acts freely, his will cannot be impeached because harsh, unreasonable, imprudent, or unaccountable in its provisions;⁷

¹ *Brown v. Riggin*, 94 Ill. 560. And see *Mairs v. Freeman*, 3 Redf. (N. Y.) 181.

² By the Roman law testaments deficient in natural duty might be set aside on that ground; as where a child of the testator was left without provision and no sufficient reason was given for the omission. 2 Bl. Com. 503; 1 Wms. Exrs. 38.

³ Swinb. pt. 2, § 3, pl. 16. And see *Waring v. Waring*, 6 Moore P. C. 349.

⁴ 1 Redf. Wills, 121; 1 Hagg. Ecc. 214; *Munday v. Taylor*, 7 Bush, 491.

⁵ *Supra*, § 20.

⁶ 2 Bl. Com. 502, 503.

⁷ *Boughton v. Knight*, L. R. 3 P. & D. 64; *Nicholas v. Kershner*, 20 W. Va. 251; *Hubbard v. Hubbard*, 7 Or. 42; *Higgins v. Carlton*, 28 Md. 118;

nor even as being devoid of natural affection and moral duty.¹ And certainly the more distant or unfamiliar one's heirs and next of kin, the less should he be expected to provide for them by his testament.²

But in order to sustain any unjust, unnatural, or absurd will, which may be contested, fair proof at least should be afforded that the testator was of sufficient capacity at the date of execution to comprehend its import; and furthermore the trier of the case should believe that neither essential mistake on his part nor the fraud nor undue influence of others about him produced so unhappy a disposition.³ And where a person is sometimes sane and sometimes insane, and the will appears crazy, unjust, unnatural, or undutiful, it may well be presumed that he executed it while insane or under the insane malady, unless indeed they who propound it can prove to the contrary.⁴ In fine a harsh and unnatural disposition by the will in question, is a circumstance which tends to discredit the maker's testamentary capacity.⁵

§ 78. **The Just Will of an Insane Person considered.** — On the other hand one who is wholly deranged in mind so as to be in a genuine sense insane cannot while in that condition, nor while under undue constraint, make a valid will, however just, natural, and reasonable might appear its provisions.⁶ Yet the circumstance that the testator, unaided by others, has made a judicious will containing nothing "sounding in folly" nor failing in natural affection and duty, bears certainly very strongly in favor of sustaining it; and we find

11 Phila. 136; *Munday v. Taylor*, 7 Bush, 491; *Davis v. Calvert*, 1 Gill & J. 269.

¹ 1 Wms. Exrs. 38, 361; c. 8, *post*; *Coffman v. Hendrick*, 32 W. Va. 119; *Schneider v. Manning*, 121 Ill. 376; 72 Iowa, 515; 118 Ill. 199.

² Motives for disinheriting kindred, and collateral kindred more especially, may readily appear in proof. See *Smith v. James*, 72 Iowa, 515.

³ *Baker v. Batt*, 2 Moore P. C. 317; *Brogden v. Brown*, 2 Add. 449; *Vreeland v. McClelland*, 1 Bradf. 394;

Montefiore v. Montefiore, 2 Add. 361; 1 Redf. Wills, 121, 122; 1 Wms. Exrs. 38, 361; *Esterbrook v. Gardner*, 2 Demarest, 543.

⁴ *Swinb. pt. 2, § 3, pl. 15*; 1 Hagg. 214; 1 Wms. Exrs. 37. And see *Boughton v. Knight*, L. R. 3 P. & D. 64; c. 8 on monomania, *post*; *Van Alst v. Hunter*, 5 John. Ch. 148, 158; *Smith v. Smith*, 75 Ga. 477.

⁵ See *Lamb v. Lamb*, 105 Ind. 456.

⁶ *Potts v. House*, 6 Geo. 324; *Harper v. Harper*, 1 N. Y. Supr. 351.

courts constantly disposed to uphold such a will, even in the case of a person habitually insane or tending to imbecility or subject to insane delusions, where there is no proof to repel the theory that it was made during some lucid interval or before the mental powers had reached the final state of decay, or free from the delusion.¹

§ 79. **Manner of making and executing the Will.** — As bearing upon issues of testamentary capacity, the manner of making and executing the will in question is an important consideration, as well as the character of the will itself. Thus, if the will be written out clearly by the testator himself which manifests intelligence on its face, this is a strong though not conclusive circumstance; and so too, where the testator took decidedly the initiative in having the will prepared and executed, instead of yielding or confiding the matter, as it would appear, to those about him.²

§ 80. **Testamentary Capacity as contrasted in Complex and Simple Estates.** — It is sometimes stated that the same degree of mental capacity is not required in making a will of a small and simple property as of a large, diversified, and complicated estate.³ But such a maxim ought duly to regard the particular testator, whether a person of business habits and accustomed to large pecuniary dealings, while in normal condition, or the reverse;⁴ the individual being, so to speak, compared with himself.

§ 81. **Will of one under Guardianship not necessarily Void.** — The test of testamentary incapacity being in a proper sense

¹ Cartwright v. Cartwright, 1 Phillim. 90; Kingsbury v. Whitaker, 32 La. Ann. 1055; Wilson v. Mitchell, 101 Penn. St. 495; Kempsey v. McGinniss, 21 Mich. 123; Peck v. Carey, 27 N. Y. 9; Gombault v. Public Administrator, 4 Bradf. 226; Goble v. Grant, 2 Green Ch. 629; 1 Wms. Exrs. 361, Perkins's Am. note. A strong recent instance in point is Silverthorn's Will, 68 Wis. 372.

² See e.g. Cartwright v. Cartwright,

1 Phillim. 90, a strong instance in point, where a will was established as made during a lucid interval.

³ Sheldon v. Dow, 1 Demarest, 503, 511. And see Campbell v. Campbell, 130 Ill. 467. See *supra*, § 68.

⁴ Cf. the *dictum* of a majority of the court as to *compos* and *non compos* in Delafield v. Parish, 25 N. Y. 97, commented upon *supra*, § 70.

sui generis, it does not follow that the will of one under guardianship is necessarily void. It would be out of place to set forth here the general scheme of practice which prevails in England and the United States for committing those who, from mental unsoundness or habitual drunkenness, or as spendthrifts, are adjudged incapable of managing their own estates, to some guardian or committee.¹ Chancery takes the essential jurisdiction of such cases in England, while in this country it falls rather to the county probate tribunals, under statutes which vary in the details of jurisdiction and process. Often does the court put a person under a commission of lunacy or guardianship where he cannot be regarded as absolutely insane, or if insane, where he is only temporarily so; the law having this main object in view, to deprive the party of managing his own estate because he is incompetent to have the care of it and would be likely to squander it. The point here at issue is therefore the general rather than the partial or particular incapacity of the person for dealing with his property; and one might even, while under such a guardianship, make a valid and intelligent will which deserved to be upheld, under the comprehensive rule of testamentary capacity already set forth.² Not only would it deserve to be upheld because at the date of execution the ward might have been entitled to his discharge from guardianship, but because, while an incompetent manager, he might not, on the whole, have been an incompetent disposer by testament of his property. For we know that one may have intelligently arranged where all shall go at his death and yet be himself sensible, as well as his relatives, that he grows more and more unfit to take care of his property; we know that one may have a lucid interval or even be fully sane once more and yet fail to demand that the management be restored to him. Guardianship under our local codes, moreover, is granted upon allegations of intemperate or spendthrift habits, rather than for mental unsoundness.

¹ See 1 Redf. Wills, 123; Sherwood v. Sanderson, 12 Ves. 445; Schoul. Dom. Rel. §§ 293, 304, 305. ² *Supra*, § 68.

. But in general where a person is placed under a guardianship for positive insanity, the investigation upon which the appointment was based is such as to establish a *prima facie* case that he was, at that date at least, *non compos* and incapable of making a valid will. And the fact of such an appointment, as well as of the testator's continuance under the guardianship, is doubtless a very important one whenever one's will is contested. But such evidence of testamentary incapacity is *prima facie* only and open to explanation by other proof.¹ Such a person may make a valid will, if he be in fact of sound mind at the time of its execution.² Nor is the character of the appointment thus made invariably such as adjudges one an insane person at all; and if the record falls short of establishing that sanity was put at issue in the proceedings for guardianship, not even a *prima facie* case of testamentary incapacity is thus made out.³

§ 82. **The Same Subject: Adjudication of Idiocy.** — An adjudication of idiocy imports so base a mental condition that incapacity to make a will ought from this circumstance to be more readily inferred than where one is placed under the usual guardianship as a lunatic or generally insane; though it still holds true that such collateral adjudication, especially if made long after the will was executed, is not conclusive against the probate of the instrument after the testator's death.⁴

¹ 1 Greenl. Ev. § 690; 1 Wms. Exrs. 38 & Perkins's note; 10 Moore P. C. 244; *Hamilton v. Hamilton*, 10 R. I. 538; *Breed v. Pratt*, 18 Pick. 115; *Lucas v. Parsons*, 27 Geo. 593; *Robinson v. Robinson*, 39 Vt. 267.

² *Cooke v. Cholmondely*, 2 Mac. & G. 22; *Bannatyne v. Bannatyne*, 16 Jur. 864; 1 Redf. Wills, 122, 133, 134; *Titlow v. Titlow*, 54 Penn. St. 216; *Breed v. Pratt*, 18 Pick. 115; *Stone v. Damon*, 12 Mass. 488; *Rice v. Rice*, 50 Mich. 448; 57 Cal. 529; *Slinger's Will*, 72 Wis. 22; *Pendleton's Will*, 1 Con. Sur. (N. Y.) 480.

³ This holds true of a probate order adjudging a man "incompetent to have the care of his property." *Rice v. Rice*, 50 Mich. 448. But such an order may be put in evidence as bearing on the testator's condition. *Ib.*

If the inquisition for lunacy was in fact *ex parte*, the value of the record is not great in an issue of will or no will. *Bannatyne v. Bannatyne*, 14 E. L. & Eq. 581. And see as to guardianship for drunken or spendthrift habits, *Lewis v. Jones*, 50 Barb. 645; *Leckey v. Cunningham*, 56 Penn. St. 370.

⁴ *Townsend v. Bogart*, 5 Redf. 93.

§ 83. **Sound and Disposing Mind and Memory.** — The word “memory” is much used in connection with this subject of testamentary capacity, coupled with “mind.” A disposing memory is understood to be one which is capable of recalling to the testator’s own view all his estate and all the persons who naturally and properly would partake under his disposition of it.¹ Lord Coke mentions the necessity of a “disposing memory” or a “safe and perfect memory”;² and the time-honored phrase, which asserts the testator’s confidence in his own mental capacity, is, as wills are commonly drawn “being of sound and disposing mind and memory”; with perhaps the prefix “being in sound [*or* sufficient] bodily health.”³

The issue is sometimes stated as one of “sound mind, memory, and understanding.” In a broad sense, however, the phrase “sound mind” covers the whole subject. “Emphasis,” observes an English judge in 1873, “is laid upon two particular functions of the mind which must be sound in order to create a capacity for the making a will; there must be a memory to recall the several persons who may be fitting objects of the testator’s bounty, and an understanding to comprehend their relationship to himself and their claim upon him. But for convenience the phrase ‘sound mind’ may be adopted.”⁴

§ 84. **Testamentary Capacity not Dependent upon Sound Health.** — But though one’s will may allege that the testator is of sound health, neither the statement nor the condition is essential to the validity of the instrument. In other words,

¹ *Harwood v. Baker*, 3 Moore P. C. 282; *Marsh v. Tyrrell*, 2 Hagg. 122; *Den v. Johnson*, 2 South. 454; 1 Redf. Wills, 123. “It is not necessary that he collect all these in one review. If he understands in detail all that he is about, and chooses with understanding and reason between one disposition and another, it is sufficient for the making of a will.” *Wilson v. Mitchell*, 101 Penn. St. 495, 502.

² 6 Co. Rep. 23.

³ See Forms of Wills in Appendix.

⁴ *Boughton v. Knight*, L. R. 3 P. & D. 64, 66, *per* Sir J. Hannen. And see *Smith v. Tebbitt*, L. R. 1 P. & D. 398, 400.

“A disposing mind and memory may be said to be one which is capable of presenting to the testator all his property, and all the persons who come reasonably within the range of his bounty.” *Benoist v. Murrin*, 58 Mo. 307, 322. See also 4 Wash. C. C. 267.

testamentary capacity is not conditional upon the possession of sound health or of great vigor or activity, whether intellectual or physical. "Incapacity," it is said, "cannot be inferred from a feeble condition of mind or body. Such a rule would be dangerous in the extreme." If, therefore, the will in question be the free act of the testator, within the scope of the rule for testamentary capacity already stated, the disposition of one in impaired health should stand.¹

§ 85. **Classification of Insanity; the Various Kinds.** — Insane persons are thus classified by Lord Coke, after the inexact mode of mental analysis which obtained in his times: (1) An idiot or fool natural; (2) He who was of good and perfect memory, and by the visitation of God hath lost the same; (3) The lunatic, who enjoys lucid intervals, who sometimes is of good and perfect memory, and some other times *non compos mentis*. (4.) He that is so by his own act, as a drunkard. The insane person was in general styled *non compos mentis*.² Blackstone a century ago used less pains at precise expression. "Madmen," he says, "or otherwise *non compotes*, idiots or natural fools, persons grown childish by reason of old age or distemper, such as have their senses besotted with drunkenness — all these are incapable, by reason of mental disability, to make any will so long as such disability lasts. To this class, also, may be referred such persons as are *born* deaf, blind, and dumb; who, as they have always wanted the common inlets of understanding, are incapable of having *animum testandi*, and their testaments are therefore void."³

Idiots and lunatics were the two classes of persons to whom the law formerly extended its protection on the score of mental unsoundness, as the classes most plainly told apart; for the former never had reason, while the latter had lost the

¹ See *Horn v. Pulman*, 72 N. Y. 276; *Cornwell v. Ricker*, 2 Demarest, 354; *Wilson v. Mitchell*, 101 Penn. St. 495.

One who is in the last stages of consumption and under the delusion that he will recover, and frequently delirious besides, may yet make a valid will. 6 Dem. 123; *Ayres v. Ayres*, 43 N. J.

Eq. 565. And so may one who is dying of a cancer, and emaciated, weak, and irritable. *Stoutenburgh v. Hopkins*, 43 N. J. Eq. 577. And see *Kerr v. Lunsford*, 31 W. Va. 659.

² 4 Co. Rep. 123.

³ 2 Bl. Com. 497.

reason they once possessed. But it was gradually found that many more required such protection, whose symptoms of disorder, though mildly manifested without the violence or notable derangement or intermittent brightness which attended lunacy, had yet equal claim to be regarded as implying a loss, not the natural denial, of reason. A decline of intellectual power, of interest in their usual pursuits, of the capacity for comprehending their relations to persons and things, marked this phase of mental unsoundness. Instead, therefore, of giving the word "lunacy" a scope large enough to include them, the modern disposition is to apply specific terms to describe various disorders whose range of reason is wider than that of the utterly imbecile and brute-born idiot. Monomaniacs or those having insane delusions, or, as it is somewhat inaccurately said, who are only partially insane, are examples of this milder type of insanity; those, again, who are affected with a delirium like that produced by drunkenness, sufficient to drown the reason for the time being; persons grown childish from decay of the mental powers by reason of old age, whose affliction is styled senile dementia; and so on. These are the kinds of insanity with which our courts have chiefly to deal in practice when considering the question of testamentary capacity in any individual case. But, after all, the manifestations of insanity are subject to so great variation that we may not easily define them, nor the word "insanity" itself.

§ 86. **The Same Subject: Insanity defined.** — Insanity, the word humanely used at the present day to designate all mental impairments inconsistent with soundness of mind, is more readily concluded from the symptoms in a given case than defined on abstract principle. High legal and medical authority defines it as the prolonged departure, without adequate cause, from the states of feeling and modes of thinking usual to the individual in health.¹

Insanity may involve bodily diseases, but the disease primary and predominant, where it exists, or the congenital defect, has its seat in the brain.

¹ Bouv. Dict. "Insanity"; 3 Curt. Ecc. 671.

§ 87. **Psychology of Mental Unsoundness, and Unity of the Disorder.** — The foregoing definition of insanity is essentially one of medical jurisprudence, and medical science at the present stage of its progress confesses itself unable to frame a more exact one. Psychologists have not classified mental unsoundness with success; for the same names have been used to denote quite distinct phenomena, according to the standpoint of observation; and, moreover, the insane delusion, the symptom, has been too long treated by them as a substantive disease, indicating that the mind may be unsound in some factor but sound in all the others. "It is the latter tendency, in fact," observes a sound writer on this subject, "that has, more than all other causes, tended to lower the authority of psychology with the courts."¹ And he proceeds to state that the weight of psychological opinion is now to discard this process of disintegration, and to treat the mind as a unit, which, whenever diseased, however distinctively the disease may manifest itself, is diseased as a whole.²

The fundamental functions or properties of the mind are stated as these three: feeling, will or volition, and thought or intellect; this last including the powers known as perception, memory, conception, abstraction, reason, judgment, and imagination.³ These three functions are inter-dependent, and affected together by mental disease; so that instead of considering numerous insanities to which this division or subdivision might give rise, we should consider that insanity, while flitting, perhaps, from function to function, or spreading over the mind, is but one disease capable of manifesting itself in various ways.⁴

§ 88. **Courts apply Practical Tests without attempting Exact Classification.** — The various grades and types of insanity, however interesting they may be in a philosophical point of

¹ 1 Wharton & Stillé Med. Jur. § 305.

² *Ib.*

³ Bain Mental and Moral Science; Sir Wm. Hamilton Metaphysics.

⁴ 1 Wharton & Stillé Med. Jur. § 308. It follows that the doctrine of "moral

insanity" as something which may co-exist with mental sanity, so as to relieve one of criminal accountability, and yet render him capable of sound conduct in affairs, is untenable. *Ib.* § 531 *et seq.*

view, receive, on the whole, no very close practical consideration from our judges. Courts attempt no exact classification of the subject. In criminal cases they are governed by their tests of responsibility ; and in civil cases by the amount of capacity shown in connection with the transaction in question. The whole proof in a given case (aided, perhaps, but not guided, by the opinion of voluntary medical experts) is laid usually before a jury, to determine, by weighing it after a common-sense fashion, whether (supposing the crime to have been committed or the transaction performed by him) the person was at the time and in the act responsible or irresponsible, mentally capable or mentally incapable.

§ 89. **Testamentary Capacity as applied in Tests of Mental Unsoundness or Coercion.** — Some have dwelt upon the expression “testamentary capacity” as though the test of mental soundness and unsoundness were an abstract one. The incapacity of infants, married women, aliens, and the like may, where the law recognizes its existence, be pronounced abstract or of general and absolute force ; but whenever an issue of insanity or undue influence is presented, the question appears concrete rather, *devisavit vel non* ; was that will the free and intelligent product of the testator’s mind or not. One might, in a certain sense, be thought insane, and yet the will should stand as a disposition untainted by his insanity ; he might, on the other hand, be sane, and yet the will should fail, because he did not make it as a free agent. “Testamentary capacity” is not, perhaps, a happy term to use here, but out of deference to the courts we may still employ it ; with this qualification, that, excepting possibly in brutish types where reason is a blank, no ideal standard of capacity is offered for gauging the brain, but court or jury must determine whether a weak or diseased mind made in the given instance a normal disposition by testament or not. Even here, nevertheless, a general comparison of the various symptoms and forms of mental derangement which are exhibited in our testamentary causes will greatly assist the investigation and guide to a just conclusion.

CHAPTER V.

INCAPACITY OF IDIOTS, IMBECILES, AND PERSONS DEAF,
DUMB, AND BLIND.

§ 90. **Idiots are Incapable; What is Idiocy.** — Idiocy, which is insanity in its lowest type, since it presupposes a want of understanding from nativity, and allies its subject to the brute creation, is utterly inconsistent with the power to dispose by will, or indeed with mental capacity of any kind, or even in extreme cases with accountability for crime. We may not well define this condition; but an idiot is recognized by all intelligent persons who deal with him, and is a fit subject for the asylum, unless his own family will provide tenderly for his welfare and keep him secluded from society. Medical classification regards idiots of the lowest class as mere organisms, masses of flesh and bone in human shape, in which the brain and nervous system cannot control the muscles, having neither the power of locomotion nor speech, and whose mental faculties are buried in darkness; fools, a higher class of idiots, who can partially command the voluntary muscles, and consequently have a considerable power of locomotion and animal action, and imperfect speech, and whose reason glimmers faintly; and simpletons, or the highest class of idiots, in whom the harmony between the nervous and muscular systems is so nearly perfect that the power of locomotion and animal action are normal, and who have reason enough for their simple individual guidance, but not for their social relations.¹

Idiocy results either from congenital defect or from some obstacle to the normal development of the faculties in childhood, and is manifested generally by malformation of the head and brain, and a repulsive expression. Unfortunates of this

¹ Report of Dr. Howe to the Massachusetts legislature, cited in 1 Redf. Wills, 61.

class have been taught decent and proper habits, and may even be trained to some degree of efficiency in rude industrial pursuits; but education has never fitted them for unpainful companionship with the intelligent part of mankind, for whose society animals like the dog or horse, from their lower but positive plane of intelligence, are naturally so well fitted, while here the hidden propensities of the human but unnatural brute suggest a constant source of danger.

§ 91. **The Same Subject.**—Some of our earlier text writers, whose observations of mental phenomena could not have been profound, were at pains to discern some legal test of idiocy. Fitzherbert, perhaps the first of them, laid it down that if a person could not count twenty pence, or tell who were his father and mother, or how old he was, he was to be set down as an idiot; but that if he knew and understood his letters, and could read by another man's teaching, he was not.¹ But, as Lord Hale has correctly observed, all this may serve for proof, but it is too narrow for conclusion; and idiocy is in any case a question of fact to be settled by all the proof, and sometimes by inspection.²

Idiocy, on the whole, appears to be in strictness a natural sterility of mind, incurable from birth, and not the later perversion of a developed understanding; yet we should note that the lapse of an intelligent mind, through disease or decay, into a totally dark and benighted condition, is sometimes, in popular speech, included under this head, or, more properly, that of imbecility.³ The great characteristic of idiocy or utter imbecility is permanence with little or no variation, though it sometimes happens (as Dr. Lushington has

¹ F. N. B. 532 B. And see 1 Redf. 60; 4 Co. Rep. 123; Bac. Abr. "Idiots," etc. A 1.

² 1 Hale P. C. 29; Hovey v. Chase, 52 Me. 304.

³ See 1 Redf. Wills, 61, which, however, seems a careless use of the word "idiot." But this distinguished writer knew well what he asserted, when he stated that absolute dementia, involving

an entire destruction of the mental faculties, was a consequence, by no means uncommon, of insanity, as a result often of some sudden shock, and that persons may be rendered permanently insane and finally imbecile, by disappointment, bereavement, religious despair, and other severe shocks upon the nervous system. *Ib.* 65, 66.

observed) that an idiot will demonstrate a greater degree of excitement at one period than another.¹

§ 92. **Idiots and Utter Imbeciles have no Testamentary Capacity.**—Idiots and utter imbeciles of every description, whether the want of understanding were produced at birth or in later life, are necessarily devoid of testamentary capacity.² Such persons may acquire a title in property by act of the law, but they cannot manage their own affairs, nor make a valid contract, nor of course a will; nor are they held responsible for criminal acts; in short, the civil disability of an idiot or utter imbecile is as complete as possible.³

§ 93. **The Same Subject illustrated.**—A recent New York case affords an instance of base mental condition, approximating

¹ *Bannatyne v. Bannatyne*, 14 E. L. & Eq. 581, 590, 591, *per* Dr. Lushington.

² *Bannatyne v. Bannatyne*, 14 E. L. & Eq. 581; 1 Redf. Wills, 61; *Converse v. Converse*, 21 Vt. 168.

So low is the order of intelligence and capacity for idiots that the difficulty ordinarily presented in contests over the will of a testator whose sanity is at issue cannot be said to arise here. Cases of incapacity where intellect is manifested to a very low degree may be dismissed from the present consideration. See *e.g.* the facts presented in *Stewart v. Lispenard*, 26 Wend. 255. If the alleged idiot can be shown to have intelligently and without constraint or fraud performed acts of business during the period in which idiocy is claimed to exist, he is no idiot at all. *Bannatyne v. Bannatyne*, 14 E. L. & Eq. 581, 16 Jur. 864, is a case in point. It was shown that the testator kept a bank account, drew drafts properly upon it, and received the money alone in person. "Many acts of business," observes Dr. Lushington while discussing these facts, "could possibly be done by a lunatic and the lunacy not detected; but it is scarcely possible to predicate the same of an idiot or an imbecile person. . . . Surely no idiot could have done this, for he

must have exercised thought to go to the bank, memory and judgment as to the sum required; and moreover his conduct and demeanor could not at such times have been as described by the witnesses against the will, or, from the glaring colors in which his imbecility is depicted, it must have been discovered, and the business could never have been transacted at all. . . . To put these acts upon the very lowest basis on which they can be placed, they do utterly disprove idiocy or imbecility. I will simply repeat, what I have already said, that those who are afflicted with lunacy sometimes have the management of and can manage their pecuniary affairs,—an idiot never."

³ Dr. Ray and some other writers on medical jurisprudence define "imbecility" as a form of insanity consisting in mental deficiency, either congenital or resulting from an obstacle to the development of the faculties, supervening in infancy. Dr. Ray, "Insanity," 71; Wharton & Stillé, § 314; Bouv. Dict. "Imbecility." This is rather a narrow definition for the law to stand upon, considering the popular significance of this word; nor are the courts by any means so precise in its use.

idiocy, in one of whose incapacity those who planned for her property appear to have taken advantage. An unmarried woman owning real estate of considerable value lived, after her mother's death in 1862, at the house of her cousin. Here she died in 1879, a little more than fifty years of age, having made the alleged will in 1869, signed by a cross, which left all to a member of the family, her cousin's daughter. This daughter was present when the alleged testatrix visited a lawyer's office, where the will was drawn, and also at the time of the alleged execution. It was this daughter's brother who wrote decedent's name around the cross. As to the alleged testatrix herself, it appeared that she was a member of the Methodist church, and attended church and Sunday school regularly; that she took care of her room and person, and could do some light housework and needlework. But she was not in vigorous health, was afflicted with stuttering, uttered only short sentences, never learned to read or write, though she had attended school for three years, could not count more than ten, nor tell the time of day from the clock, nor add or multiply; had no idea of the value of property, or of money beyond ten cents, was easily lost in familiar streets, had no understanding of what her estate was worth; otherwise evinced a weak mind, being unable to attend to most of those things which persons of ordinary intelligence can perform; had two sisters, one of whom was in an insane asylum, and in 1871 was herself adjudged an idiot. Upon this testimony the court refused to admit the will to probate.¹

§ 94. **Persons born Deaf, Dumb, and Blind.** — Persons born deaf, dumb, and blind were long presumed by our law to be idiots; for the senses being the only inlets of knowledge, and these, the most important of them, being closed, ideas and associations were shut out from the mind.² It followed that no such person was capable of making a valid will.³ Down to

¹ *Townsend v. Bogart*, 5 Redf. 93 (1881).

² 1 Wms. Exrs. 17; Swinb. pt. 2, § 4, pl. 2; Taylor Med. Jur. 690, 691.

³ 2 Bl. Com. 497 states the incapacity firmly as to those *born* deaf, dumb, and blind. And as late as the New York case of *Brower v. Fisher*, 4 Johns. Ch.

a period not a hundred years remote this opinion widely prevailed, a contempt for physical infirmity, long characteristic of the English race, giving emphasis to the hopeless condition of these unfortunates. Even the deaf-mute, so born, whose eye was quick to observe, has been remitted to the same rule of incapacity, for, though he might be intelligent, others did not commonly find him intelligible.¹

Infirmities such as these may be, and, we think, usually are, purely physical in their origin, involving no abnormal condition of the brain. But like a solitary prisoner of state who pines for years in a dark dungeon, one lapses into mental disorder, or his faculties become stunted and fail of their natural development, because sympathetic intercourse and the educating process are wanting. Particularly is this true of those born deaf, dumb, and blind; for when disqualification comes through the failure of the senses after the mind has developed, so that solitude is not vacancy, or where one at least of these three channels of social intercourse is left open, capacity ought more readily to be presumed than incapacity.

Deaf-mutes are found in our times as bright and intelligent as the average of mankind in any class, and the remarkable instance of Laura Bridgman has shown the humane world, since 1848, what training combined with sympathy can do to redeem one born deaf, dumb, and blind from the reproach of idiocy.² It should, in truth, be set down, that, like the solitary captive in his dungeon, such beings have become mentally

441 (A.D. 1820), the deaf and dumb by nativity were considered as *prima facie* insane until capacity was proved by special examination. The decision under an inquest cleared, to be sure, the defendant, because the presumption was overcome, and Chancellor Kent refused to deem him an idiot from the mere circumstance of being born deaf and dumb. "Perhaps, after all," adds the Chancellor, "the presumption in the first instance is, that every such person is incompetent. It is a reasonable presumption, in order to insure protection and prevent fraud, and is founded on

the notorious fact, that the want of hearing and speech exceedingly cramps the powers, and limits the range of the mind."

¹ 1 Redf. Wills, 51, 52; 1 Wms. Exrs. 17; *Brower v. Fisher*, 4 Johns. Ch. 441.

² Laura Bridgman was, at the Institution of the Blind in South Boston, taught how to converse and even to write. Her case and its successful treatment excited the astonishment of European tourists some forty years ago, many of whom describe her appearance in their published books of American travel.

deranged in the past more from the want of an outlet than an inlet; that the callousness or cruelty of the strong has proved their crushing misfortune. For no one is so physically bereft of the senses, that mind, if there be one, cannot in some way respond to mind.

§ 95. **The Same Subject: Unfavorable Presumption, if any, may be overcome.** — But the presumption of idiocy and testamentary incapacity in those born deaf, dumb, and blind was by the common law *prima facie* only, and might always be overcome by proof that the person had sufficient understanding; in which case he was at liberty to declare by signs a will, which, under present statutes, ought further to be reduced to writing, according to his wishes, and suitably executed.¹ For one may execute a written instrument without seeing it or knowing how to write. Modern alphabets and codes make obvious the intention of the dumb, many of whom can express themselves on paper at this day as well as the average of society. It is by no means impossible, then, that one deaf, dumb, and blind should make a valid will;² and that deaf-mutes or any others whose senses are not deficient beyond one or two of these infirmities may do so is clear.³ Deafness, though absolute, creates no incapacity. In short, it is doubtful whether the presumption of incapacity retains in our law any force whatever as to the deaf, dumb, and blind; but if it does, very slight proof will dispel it, in any case where education has drawn out the imprisoned intellect.⁴

§ 96. **Persons Deaf, Dumb, or Blind, but not born so, presumed Capable.** — They who have maintained that the deaf, dumb, and blind are to be presumed incapable of testamentary disposition, appear to have confined this positive asser-

¹ See 2 Bl. Com. 497 and notes.

² Richardson, J., in *Reynolds v. Reynolds*, 1 Spears, 256; *Weir v. Fitzgerald*, 2 Bradf. 42.

³ 1 Redf. Wills, 51, 52; *Brower v. Fisher*, 4 Johns. Ch. 441, *per* Chancellor

Kent; *Weir v. Fitzgerald*, 2 Bradf. 42; 2 Bradf. 265; *Potts v. House*, 6 Geo. 324; *Dickenson v. Blisset*, 1 Dick. 268; *Harper, Re*, 6 M. & Gr. 731.

⁴ *Gombault v. Public Admr.*, 4 Bradf. 226.

tion to such as were born so. To suppose that from one or all of those infirmities a mind which has once reached discretion becomes *prima facie* disqualified is an insult to the afflicted. Deafness, dumbness, blindness may, to be sure, like a humpback or splay-foot, the loss of a limb or some incurable disease, or any other impediment to social enjoyment, in extreme cases produce moroseness and distortion of character; but the progress towards mental incapacity, if there be any, is usually very gradual. Nor can we easily conceive of a person who is made a deaf-mute by causes which supervene the state of infancy; on the contrary, the disability thus manifested is partial only, unless indeed the sufferer should reach that last stage of general decay and exhaustion where the collapse of faculties, mental and physical together, makes it plain enough that reason has lost her throne.¹

Instances may be found, quite recent, in the reports, where the will of a blind and deaf person, made when he was more than a hundred years old, has been allowed probate.² Blindness, deafness, or dumbness, in a case like this, and whenever, in fact, the disability was not congenital, may still be competent as bearing upon the issue of mental capacity, of will or no will, but the infirmity itself affords no presumption whatever of legal disqualification.

§ 97. Liability of Deaf, Dumb, and Blind to Imposition and Error.—Aside, however, from the question of their capacity or incapacity, it is evident that the deaf, dumb, and blind are peculiarly liable to error and imposition, not to add constraint, in making their wills, so often dependent are they upon others for expressing their last wishes, if not physically helpless besides.

¹ Swinb. pt. 2, § 10; 1 Wms. Exrs. 18.

² Wilson v. Mitchell, 101 Penn. St. 495. Nearly as strong a case is that of Lowe v. Williamson, 1 Green Ch. 82. And see Gombault v. Public Admr., 4 Bradf. 226; Weir v. Fitzgerald, 2 Bradf. 42. In Gombault v. Public Admr., 4 Bradf. 226, it was held that where the

testator, a person of great intelligence and acquirements, but totally deaf in his declining age, had for a long time carried on communications with others by their writing on a slate and receiving his answers orally, it was competent to perform the ceremonies of executing his will in that mode.

As to educated mutes who can read and write no great difficulty need arise. It would be desirable for one of this class to write out his will, or else the instructions to his scrivener; and in all respects he ought to express his wishes so that the witnesses to his testament shall understand him clearly. Where signs of understanding and approval are made instead, the deaf and dumb code, now so common in conversation, seems a preferable method to mere motions whose meaning strangers surrounding him might fail to interpret intelligently. That mode of execution, in short, which is most intelligible to the outside world, as well as to intimates, fellow-sufferers, and deaf and dumb instructors, is the most prudent, on the whole, for making it clear that the will attested was the product, in all respects, of the testator's own mind.¹

§ 98. **The Same Subject: Wills of Blind Persons.**— One with an impediment makes, in fact, the most intelligible will where he avoids the uncertainty peculiar to that impediment. Thus the educated man, deaf or speechless, who writes or carefully reads to himself his own will, and makes the most of his sight, enters upon a disposition not likely to fail. The blind has his own corresponding precautions to take, and should naturally make the most of his other organs. In the old text-books of ecclesiastical law, it was laid down that the blind person might make his oral or nuncupative will, but not a written one, unless the writing had first been read over before witnesses and duly acknowledged by the testator in their presence; and the civil law following its own formula of capacity, was to much the same effect.² With nuncupative wills

¹ 1 Redf. Wills, 52; Swinb. pt. 2, § 10, pl. 2; 1 Wms. Exrs. 17, 18. A testator, in a reported case before the English court of probate, was deaf and dumb. He made his will by communicating instructions to an acquaintance by signs and motions. These instructions were reduced to writing; and the will was accordingly executed. The court required, however, an affidavit from the person who drew the will,

stating the nature of these signs and motions by which the instructions were communicated, and ultimately refused to grant probate of the instrument. *Owston, Goods of*, 2 Sw. & Tr. 461. And see *Geale, Re*, 3 Sw. & Tr. 431; *Moore v. Moore*, 2 Bradf. 261.

² 1 Wms. Exrs. 18, 19; Swinb. pt. 2, § 11. For the reason of the Roman law on this point, see *Gaius*, ii. 102–104; *Inst.* ii. 123.

English and American courts have, of course, but little concern in modern times, as most wills should be written ; but our law is not at the present day so rigid with reference to the written wills of those deprived of sight. It is highly expedient, doubtless, that such a will should not be executed or witnessed without being first carefully read to the testator aloud.¹ Yet the testator's knowledge and approval of the contents being the main thing, wherever this is assured by adequate proof of some sort, the other requirement may well be dispensed with.² Good reason might exist for keeping witnesses ignorant as to the contents of the will read to the testator which they are called upon to attest ;³ but it is not necessary to show even that the identical paper produced for probate was ever read over to the testator himself.⁴ In short, the blind testator's knowledge of the contents of the instrument may be inferred from the whole of the testimony, and the circumstances attending its execution.⁵ His declarations made after the execution of the will are competent to show that he knew what provisions his will contained at the time he executed, and that the instrument, in fact, embodied just what he purposed it should.⁶

§ 99. General Conclusion as to the Wills of the Deaf, Dumb, and Blind. — In a case, therefore, of mere blindness, or other physical infirmity, if no allegation of deception, undue influence, essential error, or fraud of any kind is made or sustained, probate of the will should be granted upon satisfactory evidence that the testator knew and approved of the contents of the instrument. Our law does not prohibit the deaf, dumb, or blind from making their wills. Defects of the senses and bodily defects, or diseases in general, do not incapacitate if

¹ *Fincham v. Edwards*, 3 Curt. 63; *Weir v. Fitzgerald*, 2 Bradf. 42.

² 1 Wms. Exrs. 18; 4 Burn Ecc. L. 60; 2 Cas. temp. Lee, 595; *Martin v. Mitchell*, 28 Ga. 382; 1 Redf. Wills, 55; *Axford, Re*, 1 Sw. & T. 540.

³ *Wampler v. Wampler*, 9 Md. 540.

⁴ *Fincham v. Edwards*, 3 Curt. 63, affirmed in 4 Moore P. C. 198; *Lewis*

v. Lewis, 6 S. & R. 496; *Hess's Appeal*, 43 Penn. St. 73; *Boyd v. Cook*, 3 Leigh, 32; *Glifton v. Murray*, 7 Geo. 564; *Martin v. Mitchell*, 28 Ga. 382.

⁵ *Guthrie v. Price*, 23 Ark. 396; *Day v. Day*, 2 Green Ch. 551.

⁶ *Davis v. Rogers*, 1 Houst. 44; *Hurleston v. Corbett*, 12 Rich. 604.

the testator possesses sufficient mind to perform a valid testamentary act. As for our present statutes of wills, they do not, in any instance, insist upon the ceremonial of reading over the will to the testator in presence of the witnesses, desirable as such a ceremonial might be, in case of the illiterate or those of very defective vision.¹ It is true that something more than the mere formal proof of execution is requisite to establish the validity of a will when, through the infirmities of the testator, his impaired health and capacity, or the circumstances attending the transaction, the usual inference cannot be drawn from the formal execution. In such a case, additional proof should be furnished that his mind accompanied the will, and that he was cognizant of its provisions. This, however, may be established by the subscribing witnesses or by evidence *aliunde*.²

It follows that, in the probate of wills executed by a blind, deaf, or dumb testator, there is no positive requirement that the witnesses should be able to depose that the testator was cognizant of the contents of the paper which he declares to be his will, and desires them to attest;³ though there can be no question that the more prudent and proper course is for the disabled testator, by appropriate acts, to make that cognizance clear to them.

Some of eminent authority appear still to regret the departure of that ancient injunction that the will of a testator who is blind or cannot read, should be read over to him in the presence of witnesses before he executes it.⁴ But the liberal rule of the present day on that point is sensible, natural, and founded in practical experience. Even supposing the will to have been thus read over, cognizance does not

¹ In *Weir v. Fitzgerald*, 2 Bradf. 42, 68, these doctrines are carefully set forth. The Roman civil law on the point of a blind man's will, observes Bradford, Surrogate, in this case, has not prevailed in England, nor been incorporated in any of the statutes relative to wills. "The object of requiring the will to be read to the blind man," he adds, "was doubtless to prevent

fraud, the substitution of one instrument for another, and to secure evidence, beyond the mere *factum* of the will, of the knowledge of the contents of the identical will by the testator."

² *Ib.*

³ 1 Redf. Wills, 57; *Fincham v. Edwards*, 3 Curt. 63; *Weir v. Fitzgerald*, 2 Bradf. 42.

⁴ See 1 Redf. Wills, 58.

necessarily follow ; yet cognizance is the essential. At the same time, the force and justice of Jarman's observation under this head must be conceded : " That, in proportion as the infirmities of a testator expose him to deception [or, we may add, to material error], it becomes imperatively the duty, and should be anxiously the care, of all persons assisting in the testamentary transaction, to be prepared with the clearest proof that no imposition has been practised [or error incurred]." ¹

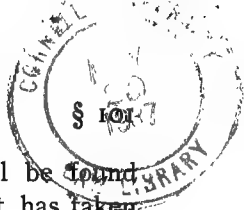
¹ 1 Jarman. Wills, 34.

CHAPTER VI.

LUNACY AND GENERAL MENTAL DERANGEMENT.

§ 100. **Scope of Present Chapter; Lunatics and Others of Mental Unsoundness in the Medium Degree.** — Our endeavor in the present chapter is to consider the incapacity of those insane persons whose mental development is higher than that of the idiot or imbecile, but lower than that of the monomaniacs, so called, the delirious, and the feeble-minded, of whom it can by no means be predicated that they are incapable at all. Mental unsoundness in the medium degree gives the scope to this chapter. At the outset, however, we shall admit that the finer attempts to classify and describe the various types of insanity are by no means satisfactory; that the forms and symptoms under which mental derangement manifests itself are so subtle and diversified, varying in fact, in different stages of social progress, running like a mountain brook now above ground and now under it, as to baffle the most wary and skilful of expert observers; and that one habit of classification has been superseded by another, without arriving at tests final and unerring.

Insanity, to define that word, settles, as we have already indicated, in the opinion of the best medical men, into a comparison of the individual with himself and not with others; that is to say, some marked departure from his natural and normal state of feeling and thought, his habits and tastes, which is either inexplicable or best explained by reference to some shock, moral or physical, or to a process of slow decay, shows that his mind is becoming diseased and disordered. Perhaps the seed of hereditary malady is germinating within him; perhaps the pressure of some sudden calamity affecting his future life and prospects, or some apprehended danger, is too great for the brain to bear up; its walls give way to the strain, and those most intimate with



him, and not seldom the individual himself, will be found conscious that some sort of mental derangement has taken place.¹

§ 101. **The Same Subject.** — Lunatics and idiots constituted formerly the only two classes of which the courts took cognizance when called upon to protect persons who were mentally deranged. To idiots who were supposed never to have had reason, applied the term *dementia naturalis*; but to lunatics *dementia accidentalis*, for their condition involved a loss by mischance of the reason they had once possessed. Hence, lunacy embraced in the broad sense all mental unsoundness not congenital, all, in a word, except idiocy. But this imperfect classification has within a century been discarded. For imbeciles of the lowest order, though accidentally demented, may well be graded with the idiot or natural fool; while lunacy, on the other hand, falls so far short of describing the second grade of insanity that a reservation of “others *non compotes*” or some such expression became needful; for which reason a new term, “unsoundness of mind,” was introduced, which, medical experts tell us, has never been very clearly defined.

Lunacy, as the word strictly imports, was a sort of intermittent or tidal insanity, so to speak. The deranged mind, in such cases, was supposed to be influenced by the moon, or at least the disorder was most violently manifested at recurring periods, and by regular phases. Another phenomenon attending it was that of lucid intervals, when the mind seemed to shine out brightly like the full moon emerging from a cloud when the sky is partly overcast. But the moon illustration has obviously no fitness for a great many of the milder examples of insanity, where, in fact, no violent derangement is exhibited, no periodical ebb and flow of madness, no lucid intervals when reason resumes her sway. In these latter cases a loss of intellect, feebleness of will, a perversion of tastes, habits, and character, and an incapacity, more or less

¹ Dr. Ray, *Insanity*, 71 *et seq.*; Dr. Gooch in 43 *London Quarterly Rev.* 355.
And see 1 *Redf. Wills*, 67.

marked, to apprehend the true relation of things, constitutes essentially the mental disorder.¹

§ 102. **Illusions are a Proof of Unsound Mind; Perversion and False Judgment are also found.** — “The belief in the existence of mere illusions or hallucinations, creatures purely of the imagination, such as no sane man could believe in,” observes Judge Redfield, “are unequivocal evidences of insanity. But where the party has correct perceptions, he will be able to make an understanding disposition of property by will, unless from imbecility he is incapable of estimating the just relations of things, or of recollecting fully the elements of a will.”² In many cases, he adds, however, the intellectual powers seem to have suffered a perversion, so that the person becomes incapable of forming correct inferences and deductions from those facts which he may correctly observe or recollect, and thus his judgment becomes no safe guide for his conduct.³

§ 103. **Attempts of Experts and Others to classify Insanity.** — That the task of classifying the different forms of insanity is a formidable one appears in the greatly differing results which the best of medical experts thus far afford. Tests of causation, symptom and order of development, all of which have their undoubted uses in the study of mental disease, are not unfrequently confounded in the most arbitrary manner. Among examples of analysis the most simple and philosophical, two, however, may be selected. The first is that of Casper and Liman, which classifies under two heads: (1) Insanity in its progress, including despondency, melancholy, excitation, mania, as among the various forms in which this progress exhibits itself; (2) Insanity in its results, including imbecility, dementia, and fatuity.⁴

The second analysis is by Dr. Ray, who adapts to his pur-

¹ Gooch, 43 Lond. Quart. Rev. 355; ² 1 Redf. Wills, 67; Taylor Med.
³ Curt. Ecc. 671; 1 Whart. & Stillè Jur. 629.
 Med. Jur. §§ 61, 744. ⁴ 1 Redf. Wills, 68.

⁴ 1 Wharton & Stillè Med. Jur. § 310.

pose the old division of natural and accidental insanity, and appears to restrict "imbecility" still to such abnormal types as are referable to birth or early years.¹ He arranges all the various disorders included in the general term insanity under two divisions, founded on two very different conditions of the brain: (1) A want of its ordinary development; (2) Some lesion of its structure subsequent to its development. "In the former of those divisions," he adds, "we have idiocy and imbecility, differing from each other only in degree. The various affections embraced in the latter general division may be arranged under two subdivisions, mania and dementia, distinguished by the contrast they present in the energy and tone of the mental manifestations. Mania is characterized by unnatural exaltation or depression of the faculties, and may be confined to the intellectual or to the effective powers, or it may involve them both, and these powers may be generally or partially deranged. Dementia depends on a more or less complete enfeeblement of the faculties, and may be consecutive to injury of the brain, to mania, or to some other disease; or it may be connected with the decay of old age."²

Both of these modes of classifications are commended by writers on this branch of jurisprudence; but, after all, the chief advantage that they afford is to medical men and psychologists, whose positive sanction has not been accorded to either analysis.³ For no hypothesis, according to sound modern authority, can be constructed which will meet with exactness every possible case of mental unsoundness that may come before the courts.⁴

§ 104. Common Symptoms or Manifestations of Insanity. —

The physiognomy of the person, his entire exterior, his gestures, his eyes, his words, the first impression produced upon him by the appearance of a physician, all these aid at once to detect whether he is insane, or *bona fide* sane, or cunningly

¹ See *supra*, § 92.

² Dr. Ray *Insanity*, 71; 1 Wharton & Stillé, § 314.

³ See these modes of classification §§ 310-316.

together with those of psychological

experts assembled in Paris (1867), Dr. Hammond, Flemming & Ellinger, detailed in 1 Wharton & Stillé *Med. Jur.*

⁴ 1 Wharton & Stillé, § 318.

pretending insanity. The form of the skull is often found peculiar in every description of insanity, but rarely does marked malformation appear save as to idiots and the lowest type of imbeciles. Physical condition, though not necessary to prove insanity, since insanity may exist while the bodily functions are normal, or *vice versa*,¹ is often an important factor of proof, and the more so because such conditions cannot be feigned; as for instance, nervous disturbances, sleeplessness, an irregular pulse, peculiar secretions, besides which, hereditary tendency and matters of temperament, disposition, and age, and the like, call for medical attention. One's conversation and deportment, his writings, his prior history in general, all bear upon the question of sanity or insanity, when the observer desires to form a conclusion. So, too, the nature of the act or transaction, such as its insensibility, its incongruity, its motivelessness, and the person's apparent forgetfulness of it, his failure to profit by or escape from its consequences. All of these manifestations of insanity medical men take pains to observe in their diagnosis of a case.²

A change of moral disposition is one of the first symptoms, other than physical, with which insanity as a disease usually makes its appearance. It is thus described in the able treatise which we have just cited. "Extreme irritability, proneness to anger, suspicion, concealment, obstinacy, and perverseness are common. In regard to the affections, various abnormal impulses and inclinations are observed: such as fondness or aversion to particular persons, without any special reason; disposition to exercise cruelty, murderous desires, a wish to commit arson, or to steal. Memory is generally good in reference to things occurring during the disease, or to persons with whom the patient was then connected, but defective or mistaken as to things which occurred previously. Of the intellectual faculties not all are uniformly in an abnormal state; on the contrary, some functions occasionally improve,

¹ *Supra*, § 84.

at length from the medico-legal stand-

² See 1 Wharton & Stillé Med. Jur. point.

§§ 345-389, where this subject is treated

thus producing a complex state of madness on the one hand, and of wit, reflection, and shrewdness, on the other.”¹

§ 105. **The Will of a Lunatic or one Mentally Diseased is Invalid.**—Now, as to wills more especially, and the testamentary incapacity of persons who are lunatics or mentally diseased; in other words, the usual cases embraced under the head of general insanity, not congenital. While the insanity exists, the testament of such a person is not good, because every testament should be the product of a sound and disposing mind and memory.² But if the disease be not incurable, a state of mind may exist during which one’s voluntary disposition may deserve to stand as a normal one. And the mental disease in a patient may so advance or recede that at one stage he might be called capable, at another incapable, while at any stage all the circumstances surrounding the testamentary act would deserve a patient consideration.

§ 106. **Effect of Restoration to Health, and Intermittent Insanity.**—If this disease, like any sickness or disorder, ends in a complete restoration to normal health, the person, being no longer *non compos*, becomes capable once more of making a will. But complete restoration is less common than a cure which leaves the faculties still impaired and liable, through feebleness of intellect, volition, or moral sense, to unsound operation and susceptible to evil influences. An intermittent insanity, moreover, is observable in some cases, not merely in the sense of a transition from insane frenzy and delirium to insane repose, but so that the mind beams out clearly once more, so to speak, from the surrounding clouds, sometimes, but not always, with a lasting radiance sufficient to disperse them. For reason, when thrown from her seat, struggles almost instinctively to recover it before succumbing to adverse circumstances, as the swimmer who is swept down a current reaches out convulsively for rope or spar until despair over-

¹ 1 Wharton & Stillé Med. Jur. 3d Ed. § 361.

² Swinb. pt. 2, § 3; 4 Rep. 123 b; *Kemble v. Church*, 3 Hagg. 273.

But, of course, a will is not revoked by the subsequent insanity of the testator. Swinb. pt. 2, § 3; 4 Co. 61 b.; *Revocation, post.*

whelms him. In either instance, the tenacious hold upon whatever offers may save the life or the reason, yet that hold will perhaps be lost again.

§ 107. **Lucid Intervals.** — Of that shining out through the clouds, as it were, the reports have had much to say in dealing with lunatics, whose mental condition suggested to those who watched them the peculiar phases and solitary wanderings of the moon. In the first stages of insanity particularly, and until the malady becomes incurable and confirmed, the attacks are to some extent intermittent, occurring at regular or irregular intervals, as the case may be, and accompanied by alternate paroxysms and relaxations. But, as an eminent writer observes, “the term ‘lucid interval’ has acquired a kind of technical import in legal language, and is not, in that sense applicable to this intermittent character of the disease.”¹

Some eminent psychologists deny the possibility of lucid intervals, as our courts define that phrase.² But there seems no good reason to doubt that such a condition of mind may exist; for many examples, besides that of George III., serve to remind us that one who loses his reason may be restored to apparent health and yet at some later date, perhaps not for years, relapse into clear insanity under the pressure of age or harassing experience. This, perhaps, is drawing the line of lucid intervals more boldly than the phrase assumes; but if the bold lines are visible, the finer ones doubtless exist, though the layman cannot trace them so clearly. The lucid interval involves, in general, a restoration of reason, consciousness, and insight sufficient for performing certain intelligent acts and assuming at least a modified penal responsibility; but in the more delicate shades of the malady, medical science confesses that the mind is not entirely clear, nor is the patient quite the capable person that he was before he became insane.³

§ 108. **Lucid Intervals, as Distinguished from Mere Abatement of Mania, etc.** — The eminent Dr. Taylor draws a dis-

¹ 1 Redf. Wills, 63.

² See 1 Wharton & Stillé Med. Jur.
§§ 744-747.

³ *Ib.*

inction between a lucid interval and the mere remission of mania. "By a lucid interval," he says, "we are to understand a temporary cessation of the insanity or a perfect restoration to reason. This state differs entirely from a remission, in which there is a mere abatement of the symptoms."¹ And again he observes, more cautiously, that nothing more is intended by lucid interval than that the patient shall become entirely conscious of his acts and capacity.² Other writers of authority on medical jurisprudence have attempted a closer grade of the different kinds of improvement or interruption, varying in order as insanity abates. There is (1) the lucid interval, essentially as defined in the foregoing section; (2) remission, which differs from a lucid interval only in degree, being generally attended with a subsidence of the external manifestations of the disease, insufficient, however, to be mistaken for recovery; (3) alternation, which term imports a change from one form of mental unsoundness to another, as, for instance, from mania to depression, and conversely, which transition is often so gradual as to give the deceptive appearance that the patient is returning to health; (4) intermission, when the disease recurs at more or less regular periods, and no anomalous symptoms are presented.³ And to quote Dr. Rush, "The longer the intervals between the paroxysms of madness, the more complete is the return to reason. Remissions rather than intermissions take place when the intervals are of short duration, and these distinguish it from febrile delirium, in which intermissions more generally occur."⁴

Distinctions so fine as these are hardly admissible in judicial administration. But to take the lucid interval in its wider legal acceptation, there is good ground for recognizing often a certain capacity for civil transactions, a certain responsibility in one who has been insane, even though his restoration to mental soundness at the particular stage of

¹ Taylor Med. Jur. 651; 1 Redf. Wills, 108, 109. This is, perhaps, too confident an assertion of the distinction in question, which must often be extremely difficult to detect in a case of insanity.

² Ib.

³ 1 Wharton & Stillé, § 747.

⁴ Rush on the Mind, pp. 162-164.

action, may not, upon a full review of his life, be pronounced perfect. Medical jurists of established repute themselves admit that even though, in an absolute diagnostic point of view, they prefer to reject the lucid interval theory, and believe in the continuity of the insane malady, they still think that one who is deranged can perform certain acts with a perfect knowledge of cause, and can even exercise his intelligence, provided that he is placed under the influence of certain protective conditions. "The regulating discipline of an asylum," wisely observes a recent writer, "tends greatly to this result, and therefore it is not astonishing if one insane can perform certain civil acts of a simple character, and may consent to a division of property, or even authorize a marriage. The legality of the act is essentially subordinate to a previous appreciation of the extent of the delirium at the time, and the relations existing between the action and the delirious conception. So, though not admitting the existence of a lucid interval, we still believe that the madman may be placed in a situation that permits him to appreciate the action demanded of him."¹

§ 109. **Lucid Intervals in Cases which involve Testamentary Capacity.**—The admission of medical jurists just noted is sufficient for the legal theory of lucid intervals which we find practically applied by our courts, in cases which involve the issue of testamentary capacity. Here, let us observe, although the insane person himself has passed beyond mortal jurisdiction, and the issue must be determined without him, the whole range of his life and the circumstances of his death assist the diagnosis. "Lucid interval" has here no fine-drawn significance; but the legal idea is that the insane person's mind, though not positively and absolutely restored to normal health, was at least capable, at the time of the testamentary act, of performing that act, and did so with independence and intelligence sufficient to justify the conclusion that his will should be sustained as a valid one. One lately insane who has fully recovered his reason once more may

¹ 1 Whart. & Stillé Med. Jur. 3d Ed. § 745.

unquestionably make his will like any other person *sui juris*; but the law recognizes a mental condition less complete—one which falls short of a plain cure, and yet should be distinguished from that condition where the patient, though calm, is still insane and incapable. "By a perfect interval," says Lord-Chancellor Thurlow, "I do not mean a cooler moment, an abatement of pain or violence, or of a higher state of torture, a mind relieved from excessive pressure; but an interval in which the mind, having thrown off the disease, had recovered its general habit."¹ This figure is convenient to enable laymen to distinguish the conditions; but the definition does not, or should not, imply that one must be absolutely restored to normal soundness, for the time being, in order to make a valid testament. The faculties of the mind are indeed restored sufficiently to enable a testator to comprehend soundly the business in which he is engaged; but he may still be laboring under extreme feebleness, from the effects of the disorder; it may be highly probable, moreover, that the paroxysm, the violent symptoms, will recur; and his restoration may be to the disposing state or mind, but not to a state so healthy as before.²

¹ Attorney-General *v.* Parnter, 3 Brown C. C. 444. See Eden's note, ib. 445; 11 Ves. 11, commenting upon Lord Thurlow's definition.

Upon this subject of lucid intervals Bradford, Surrogate, in 1857, observed with much force and discretion in *Gombault v. Public Admr.*, 4 Bradf. 226, 238, as follows: "Among the most mysterious of the phenomena of the human mind, is the variation of the power and orderly action of the faculties, under different circumstances and conditions, and at different times; and especially mysterious is the oscillation from insanity to sanity, the rational power often fluctuating to and fro, until reason ultimately settles down firmly upon her throne, or falls, never again to resume her place in this life. Without speculating upon this interesting theme, it is sufficient to say that the law

recognizes the fact established by experience, and does not hesitate to ratify the validity of a transaction performed in a lucid interval; though it is exacting in its demands, and scrutinizing in its judgment, of facts adduced to exhibit and demonstrate intelligent action at the time of the event under investigation. The principle is thus stated in the Institutes: *Furiosi autem si per id tempus fecerint testamentum quo furor eorum intermissus est, jure testati esse videntur.* (*Quibus non est permissum facere testamentum*, lib. 2, tit. 12, § 1.) And it has been fully admitted in its broadest extent in the ecclesiastical courts. There can be no doubt that during an intermission of the disease the testamentary capacity is restored."

² 1 Redf. Wills, 113; *Hall v. Warren*, 9 Ves. 611, *per* Sir William Grant; *Holyland, Ex parte*, 11 Ves. 11.

§ 110. **Will may be established as made during a Lucid Interval; Burden of Proof.**—The will of a person who was at some period insane may be established in probate by overcoming any presumption of his incapacity; and the force of such a presumption, or its existence at all, depends upon differing circumstances to be dwelt upon hereafter.¹ If the testator, once insane, has been restored to perfect soundness, his will deserves as favorable consideration in the court of probate as though he had never lost his reason.² But where a state of habitual insanity is shown, continuous and chronic, the presumption gathers great force that any will which such a person may have executed is tainted or discolored by his insanity, and consequently cannot operate.³ And unquestionably the state of insanity once clearly developed in the patient, there is much reason to apprehend that the disorder may again recur, though disappearing for a season. If, then, notwithstanding any adverse presumption, it can be established that the party afflicted habitually by mental unsoundness was wholly cured when he made his will, or, much less than this, that the testamentary disposition took place while there was an intermission of the disorder, or, in other words, during a “lucid interval,” the will should be upheld.

There are English cases which thus sustain wills made during a lucid interval, subject to the unfavorable presumption against capacity which must first be overcome.⁴ American cases are found of the same tenor.⁵

¹ *Post*, c. 9.

² *Snow v. Benton*, 28 Ill. 306.

³ See *Hix v. Whittemore*, 4 Met. 545; *Steed v. Calley*, 1 Keen, 620, 626.

⁴ *Hall v. Warren*, 9 Ves. 611; *Holyland, Ex parte*, 11 Ves. 11; 1 Wms. Exrs. 21, 22; *White v. Driver*, 1 Phillim. 84; 1 Jarm. Wills, 36; *Symes v. Green*, 1 Sw. & Tr. 401; *Nichols v. Binns*, 1 Sw. & Tr. 239.

In *Cartwright v. Cartwright*, 1 Phillim. 100, Sir W. Wynne thus states the principle: “If you can establish that the party afflicted habitually by a malady of the mind has intermissions, and if there was an intermission of the disorder

at the time of the act, that being proved, is sufficient, and the general habitual insanity will not affect it; but the effect of it is this,—it inverts the order of proof and of presumption; for, until proof of habitual insanity is made, the presumption is, that the party, like all human creatures, was rational; but where an habitual insanity in the mind of the person who does the act is established, then the party who would take advantage of the fact of an interval of reason must prove it.”

⁵ *Gombault v. Public Admr.*, 4 Bradf. 226; *Halley v. Webster*, 21 Me. 461; *Brock v. Luckett*, 4 How. (Miss.) 459;

§ 111. **Lucid Intervals; Clear and Satisfactory Proof required.** — But clear and satisfactory proof should be required that the person habitually insane made the will in question intelligently and freely, during a lucid interval, where this and not a complete recovery is to be established. The authorities above cited are quite harmonious in this conclusion.¹ Such proof, it has been well observed, is extremely difficult, for this reason, among others, that the patient is not unfrequently rational to all outward appearance without any real abatement of his malady.² On the other hand, if the deceased was subject to attacks producing temporary incapacity, and was at other times in full possession of his mental powers, such attacks may naturally create in those who only happened to see him when subject to them a strong opinion of his permanent incapacity. These considerations, while they tend to reconcile the apparent contradictions of witnesses, render it necessary for the court to rely but little upon mere opinion, to look at the grounds upon which opinions are formed, and to be guided in its own judgment by facts proved, and by acts done, rather than by the judgment of others.³

The standard of mental capacity which this proof should establish is, as we apprehend, the usual one favored by the later cases and set forth already: namely, capacity on the part of the testator sufficient to comprehend the condition of his property, also his relations towards the persons who are or might be the objects of his bounty, and the scope and bearing of the provisions of the will.⁴

§ 112. **Circumstances Favorable to Proof of Lucid Interval; a Just and Natural Will.** — It is a very favorable circumstance

Harden v. Hays, 9 Penn. St. 151; *Gangwere's Estate*, 14 Penn. St. 417; *Cochran's Will*, 1 Monr. 263; *Goble v. Grant*, 2 Green Ch. 629; *Lucas v. Parsons*, 27 Geo. 593; *Chandler v. Barrett*, 21 La. Ann. 58.

¹ Cases cited in preceding section; Sir John Nicoll in *White v. Driver*, 1 Phillim. 88.

² *Brogden v. Brown*, 2 Add. 445.

³ These prudent observations are made by Sir John Nicoll, in *Kindleside*

v. Harrison, 2 Phillim. 459, and in other cases cited, 1 Wms. Exrs. 22; also by Tindal, C. J., in *Tatham v. Wright*, 2 Russ. & M. 21, 22; and by Lord Langdale in *Steed v. Calley*, 1 Keen, 620.

⁴ *Supra*, § 68. One may be confined in an insane asylum, from time to time, for some brain disease, and released as his condition improves; and the will of such a person, made when competent, should stand. 13 N. Y. S. 255.

that a will whose execution is claimed to have taken place during a lucid interval appears just and natural in its provisions, so that injury cannot be done by admitting the instrument to probate; and conversely, the harsh and unnatural will of one who was *prima facie* insane at its execution may well be presumed the offspring of a mind still clouded by the disorder. This, we have seen, is a maxim of much wider scope for doubtful cases of mental capacity.¹ The English case of *Cartwright v. Cartwright*,² decided by Sir William Wynne and affirmed on appeal, is in point. The testatrix had early in life been afflicted with mental disorder. She afterwards was supposed to have recovered and carried on a house and establishment of her own like any rational person; but for several months before making her will and afterwards, many of the worst symptoms of insanity were manifested; and at the date of its execution, so wild and agitated was her manner that, when the will was offered for probate, the survivor of the attesting witnesses deposed quite unfavorably as to the sanity of the testatrix. The attending physician, it appeared, had kept his patient from using books and writing materials, but yielded at last to her clamorous importunity for pen, ink, and paper, and loosened her hands, which had been tied up; whereupon she sat down in her room and wrote; tearing up several pieces of paper and throwing them into the fire, pacing the room meanwhile in a wild and disordered manner. The will was written out wholly by herself and she placed her seal to it very carefully. A reasonable inference from the whole testimony appears to have been that, impressed with the uncertainty of life and reason, she had earnestly resolved to make her will, and that such being her mental purpose, the experiment of keeping writing materials out of her reach, instead of soothing her, threw her into great agitation. At all events, the eminent judge sustained the will, remarking very properly that the court did not depend on the opinions of the witnesses but on the facts to which they deposed.³ The testament in question was per-

¹ *Supra*, §§ 77, 78.

² *Cartwright v. Cartwright*, 1 Phillim.

90.
122.

fectly proper and natural and conformable to what the affections of the testatrix were proved to be at the time, and her executors and trustees were very discreetly appointed.¹

Other instances, English and American, may be adduced where the will of a person habitually insane, has been sustained as the product of a clear and calm intermission or lucid interval on proof most especially that the disposition was a just and natural one, in all respects.² And there is no

¹ *Ib.* Upon the rational character of the present testamentary disposition, Sir Wm. Wynne dwelt very strenuously in the course of his judgment. "The strongest and best proof that can arise as to a lucid interval," he observed, "is that which arises from the act itself of making the will. That I look upon as the thing to be first examined, and, if it can be proved and established that it is a rational act rationally done, the whole case is proved. What can you do more to establish the act? because, suppose you are able to show the party did that which appears to be a rational act, and it is his own act entirely, nothing is left to presumption in order to prove a lucid interval. Here is a rational act rationally done. In my apprehension, where you are able completely to establish that, the law does not require you to go farther." This statement he fortifies by the following citation from Swinburne: "The last observation is, If a lunatic person, or one that is beside himself at some times, but not continually, make his testament, and it is not known whether the same were made while he was of sound mind and memory or no, then in case the testament be so conceived as thereby no argument of frenzy or folly can be gathered, it is to be presumed that the same was made during the time of his clear and calm intermissions, and so the testament shall be adjudged good, yea, although it cannot be proved that the testator useth to have any clear and quiet intermissions at all; yet, nevertheless, I suppose that if the testament be wisely

and orderly framed, the same ought to be accepted for a lawful testament." Swinb. pt. 2, § 3, pl. 14.

Cartwright v. Cartwright was well decided upon the facts. And there were other strong circumstances (*vide* next section) which strengthened the conclusion in favor of the will. But later judges have questioned very properly whether Sir Wm. Wynne did not use language somewhat too emphatic in approbation of a rational will. It is not to be supposed that the learned judge meant to assert that every rational act rationally done is sufficient to prove a lucid interval. It is the particular manner in which the act was done in this case which led the judge to conclude that there was a lucid interval. *Chambers v. Queen's Proctor*, 2 Curt. 447, by Sir H. Jenner Fust. "Though I cannot say I altogether agree to that *dictum* [of Sir Wm. Wynne], still it is entitled to great weight, and, to a certain extent, a rational act done in a rational manner, though not, I think, 'the strongest and best proof' of a lucid interval, does contribute to the establishment of it." *Bannatyne v. Bannatyne*, 2 Rob. 472, 501, by Dr. Lushington. See also *Nichols v. Binns*, 1 Sw. & Tr. 239, *per* Sir C. Cresswell; *Gombault v. Public Admr.*, 4 Bradf. 226, 239.

² See incident mentioned in *M'Adam v. Walker*, 1 Dow. 178, by Lord Eldon; 1 Wms. Exrs. 27; *Williams v. Goude*, 1 Hagg. 577; *Chandler v. Barrett*, 21 La. Ann. 58; *Chambers v. Queen's Proctor*, 2 Curt. 415; *Gombault v. Public Admr.*, 4 Bradf. 226.

conclusive reason why the will of a person habitually insane, might not stand under such circumstances, even though he executed it while confined in a lunatic asylum.¹

On the other hand, the will of one known to be mentally unsound, has been refused probate, notwithstanding circumstances of scrupulous care on his part in framing and executing the instrument, where the disposition appears to have been absurd, weak, or unnatural; as in the case of an insane person who falls indiscreetly in love with a chance acquaintance, and straightway makes his will for the sake of bestowing a generous legacy upon her.² Wherever, in short, the will exhibits a decided perversion from the normal and natural disposition, thoughts, and feeling of the testator, while in his right mind, there is good reason to conclude it the offspring of insanity.

§ 113. **Other Circumstances Favorable to Proof of Lucid Interval.** — There may be other circumstances leading strongly to the conclusion that the will of one habitually insane which is presented for probate, was made in some clear or lucid interval. Thus, in *Cartwright v. Cartwright*, above stated, the testatrix not only made a fair and rational will, but prepared it wholly by herself in the seclusion of her own room; and what was quite remarkable, wrote it out in a very fair hand, free from confused or absurd expressions of any kind, and without a blot or mistake in a single word or letter.³ These facts bore strongly in favor of the testamentary act; though, had the will itself been an unjust or foolish one, the accurate handwriting might have gone for little.⁴ Whatever shows a careful revision or preparation of the draft by the testator himself is material in the same direction.⁵

¹ Such was the case in *Nichols v. Binns*, 1 Sw. & Tr. 239. And see *supra*, § 81.

² *Clarke v. Lear* (1791), cited in 1 Phillim. 90, 119; 1 Wms. Exrs. 27.

³ *Cartwright v. Cartwright*, 1 Phillim. 90.

⁴ In *Clarke v. Lear*, *supra*, the instru-

ment was very accurately written by the testator; and yet probate was refused.

⁵ *Mairs v. Freeman*, 3 Redf. (N. Y.) 181, is a case where it was shown that the testator drew the instructions for the will, and corrected the draft with his own hand; and the instrument was admitted to probate notwithstanding

If, again, the will proportions the different divisions of one's complex estate with very prudent care and a just regard to all the proper objects of one's bounty, this goes strongly towards proving, at least temporary sanity in the testator; for it shows that his mind grasps comprehensively a large and intricate subject.¹ Moreover, if reference to the testator's intentions, before his malady, shows that the will was in furtherance of intentions he had declared while positively of sound mind, this may corroborate the theory of a lucid interval.² And so, too, where the testator, subsequent to its execution makes intelligent recognition of the will and its provisions as though understanding it still to be the instrument which its face purports.³

§ 114. **Lucid Interval more easily established in Delirium, etc., than in Habitual Insanity.** — A lucid interval is more easily established in cases of delirium, such as a fever or dissipation produces, or where fluctuations arise from temporary excitement or from periodicity in the attacks of the disease, than in cases of habitual insanity.⁴ Of delirium, in connection with the testamentary act, we shall speak more fully in the next chapter.

§ 115. **Proof should be scrutinized where Mental Disease is Insidious and Slow.** — In general, a will made in a lucid interval may be valid; but the facts establishing intelligent action

minor errors shown, such as reciting his own age as 75, when it was really 77, and mistaking the order in which two of the daughters were born. See also *Legg v. Myer*, 5 Redf. 628, where it was shown that the testator took the instrument after it was read to him, and read it himself, pointing to certain words which at first he was unable to decipher.

¹ *M'Adam v. Walker*, 1 Dow, 178.

² *Ib.*; *Coghlan v. Coghlan*, 1 Phill. 90.

³ This was still another circumstance shown in *Cartwright v. Cartwright*, 1

Phillim. 90. In *Gombault v. Public Admr.*, 4 Bradf. 226, the fact that the contest was between the State, claiming an escheat, on the one hand, and parties, on the other, who stood to the decedent in terms of intimate confidence and affection, bore in favor of presuming a lucid interval in the testator, though the court weighed all the testimony very fairly.

⁴ *Brogden v. Brown*, 2 Add. 445; *Gombault v. Public Admr.*, 4 Bradf. 226, 239; *Staples v. Wellington*, 58 Me. 453.

should be shown, and as already stated, the nature and character of the instrument are of much importance to such an issue. Where a disease ultimately affecting the mind was insidious and slow in its development, and it may be suspected that before the testamentary act the patient or those in charge of him apprehended mental derangement, there should be a careful scrutiny of a will made shortly before the symptoms of insanity were unmistakable. Here it is desirable to learn if possible whether the testamentary act in question was rational and natural and conformed to the views and wishes of the party when mentally sound and healthy.¹

§ 116. **Doubtful Instances of Mental Derangement; Paralysis, Prostration, etc.** — “If no actual derangement or mental imbecility be found,” observes Mr. Justice Washington, “it is not sufficient *per se* to assign a cause of derangement which might or might not have produced that effect. Paralysis, for instance, is sometimes a cause of mental derangement, and frequently it is not. If attended by apoplexy, or an affection of the nerves, it necessarily affects the mind; but it frequently affects only the muscles, thereby producing bodily infirmity alone, and leaving the mind unimpaired. If the patient survives the stroke for any considerable length of time, it may in general be concluded that it was simply a paralysis affecting the body only.”²

More than this, it may be affirmed that great intellectual and physical weakness or prostration, even though accompanied by a partial failure of mind and memory, is not of itself sufficient ground for setting aside a will, if there still remains sufficient mind and memory to bring the testator within the rule of testamentary capacity which we have already set forth.³ And whether this weakness or prostration

¹ Gombault v. Public Admr., 4 Bradf. 226.

² Hoge v. Fisher, 1 Pet. C. C. 163.

³ *Supra*, § 68. The will of a testatrix of feeble health and nervous temperament, subject to hysteria and of marked personal peculiarities and personal prejudices, may be sustained,

where neither insane delusion nor undue influence appears in proof. 6 Dem. 123. And see 12 N. Y. S. 122, the case of a testator who fainted and lost consciousness, through feeble action of the heart, and then slept and awoke, feeling much better, and executed his will.

arises from paralysis, or an attack of apoplexy, or heart trouble, or any other cause, the cardinal principle of testamentary capacity is always the same.¹ One might by a stroke of paralysis or apoplexy be rendered for a time unconscious, and incapable of mental action; yet the mind so commonly rallies from a first shock in such cases that, should the patient months afterward make his will, habitual and continuous insanity ought not to be presumed to the disfavor of its probate.² So, too, may it be, where one suffers great pain at times, during his last sickness.³

Where one, after paralysis, or some enfeebling disease, attends to his business and manages his property with reasonable prudence and judgment, the inference of his testamentary capacity must be very strong.⁴

§ 117. **The Same Subject illustrated: Mississippi Case.**—In a Mississippi will case, decided in 1840, insanity as developed by paralysis was at issue. Twelve witnesses, many of whom had been acquainted with the condition of the testator's mind from March, when he was afflicted with a paralytic attack, up to the day previous to the execution of his will in December, testified to his insanity, and stated the health and conduct of the testator upon which they based their opinions; namely, palsy in the right side, leg, and face; a fondness for relating old anecdotes and scenes; forgetfulness of recent events; miscalling the names of men and things; disconnection of ideas in conversation, and frequent transitions from one subject to another; the giving contradictory orders and shortly denying having given them; impediment in speech and irritability of temper, and incompetency to transact business. Four of these witnesses were physicians, three of whom had attended the testator from time to time, and expressed the opinion that from the character of the deceased, the testator could not have had a lucid interval. Five witnesses, on the other hand, the draftsman of the will, and the

¹ See *Jamison's Will*, 3 *Houst.* 108, and other cases cited in *Hall v. Dougherty*, 5 *Houst.* 435.

² *Irish v. Newell*, 62 *Ill.* 196.

³ *Blake v. Rourke*, 74 *Iowa*, 519.

⁴ See 1 *Con. (N. Y.)* 373.

subscribing witnesses to it, declared their opinions to be that the testator was of sound and disposing mind when he executed the will. He had walked the distance of a mile on that very morning. Some of these latter witnesses, who had seen the testator some time previously, testified that an improvement in his health and mind had been going on. It was in proof that he conversed rationally and sensibly for four hours, on the day the will was executed, without making an irrational remark; gave directions about his business; dictated the will; had it read to him, and portions of it twice; conversed of early scenes; did not miscall names nor talk incoherently, but conversed intelligently and rationally about his own business, the monetary system of the country, and other subjects. It was the opinion of all these witnesses that he was entirely competent on that occasion, to transact any of his own business, including the business in question. He spoke of an improvement in his health and of its having been thought that he was insane; expressed gratification at seeing so many of his old friends on that occasion; said he was about to arrange his business and wished them to converse with him and see if he were not of sound mind and competent. Weighing all this evidence carefully, the judge of probate held that the testator was of sound and disposing mind, and admitted the will accordingly; and upon appeal, this judgment was sustained.¹

§ 118. **The Same Subject: Other Illustrations: Epilepsy, Apoplexy, etc.**—It is quite recently held in Illinois, that proof of periodical epileptic attacks, attended with convulsions, loss of consciousness and the other usual sequences of such attacks, or proof of temporary pneumonia supervening the attack with fever and delirium, is not such proof of insanity as to create a presumption of its continuance until rebutted by proof.²

Epileptic fits are often, perhaps usually, very sudden, and

¹ Brock v. Lockett, 4 How. (Miss.) 459.

² Brown v. Riggin, 94 Ill. 560 (1880).
And see Godden v. Burke, 35 La. Ann. 160.

in the earlier stages of the malady more especially, one may retain his faculties to the very moment of the attack. Upon all the evidence, therefore, a will was lately sustained in Wisconsin where the person having had an epileptic fit one day, sent for a priest the next, and in a few minutes after executing the instrument intelligently was seized with another fit, and died a day or two afterwards.¹

§ 119. **Mental Condition nearly Contemporaneous with the Will, etc.**—Where one's mental condition appeared to his medical attendant suitable for the testamentary act, or the reverse, shortly before or after the will was made, testimony to this purport should carry great weight.² But after all, the real point at issue upon which such testimony bears, is the mental condition, the state of surrounding circumstances, at the precise time of the testamentary act.³

¹ Lewis's Will, 51 Wis. 101 (1880). This was certainly a very close case; as there was reason for believing that the decedent was in a semi-comatose and nearly unconscious state when the will was signed; but it was drawn up, at least, under his direction.

In a New York case (1879), Parker, Surrogate, admitted a will and codicils to probate under the following circumstances. At the execution of the last codicil (the only testamentary instrument in dispute) the testator had for about six weeks suffered from an apoplectic stroke resulting in paralysis. When first attacked, he was unconscious, but he rapidly improved in mind and body, so that his physician ceased to attend him, and, though he never regained the power of speech or his former mental vigor, he became able to read, and did read, the daily paper, often calling attention to items which interested him. He also read the Bible much, received visits, shook the hands of visitors, understood conversation, and manifested an interest in his pecuniary affairs; in short, he was able to com-

prehend the extent of his property, the number of his children and their relations to him, and had sufficient mind to understand the ordinary business transactions of life. *Legg v. Myer*, 5 Redf. 628.

See further, *Foot v. Stanton*, 1 Deane, 19, an extreme case, where the will of a person subject to epileptic fits was admitted to probate. In *Andrews, R.*, 33 N. J. Eq. 514, the will of a woman made in the later stages of pulmonary consumption was sustained against expert testimony tending to show that medicines such as she used would affect the brain.

² *Dyer v. Dyer*, 87 Ind. 13. Especially would this hold true of an attending physician between whose regular visits, not being daily, the will was made and executed. *Gombault v. Public Admr.*, 4 Bradf. 226.

³ *Harden v. Hays*, 9 Penn. St. 151; *Gangwere's Estate*, 14 Penn. St. 417; 16 Oreg. 127. And see the discrimination exercised by the court in this respect in *Brock v. Lockett*, 4 How. (Miss.) 459, as stated *supra*, § 117.

§ 120. **Suicide not Conclusive of Insanity.**—Suicide committed by the testator soon after making the will is not conclusive evidence, therefore, of insanity at the time when the will was made; though as a fact in connection with other proof from which prior mental derangement might be inferred to the extent of incapacity, it should not be ignored.¹ In a leading case under this head, the testator actually committed suicide on the morning after the day on which he made his will; and yet the will was admitted to probate.² Suicide is by no means the act of a person necessarily insane; but the murder of one's self, like the murder of another, may proceed from a sane and deliberate purpose; hence the chief value of this proof consists in the corroboration it affords in a given case, when taken with other facts and symptoms, to the theory of mental soundness or unsoundness at the date of executing the will.³

¹ Taylor. Med. Jur. 680, 681; 1 Redf. Wills, 116; Burrows v. Burrows, 1 Hagg. 109; Duffield v. Morris, 2 Haring. 375; Chambers v. Queen's Proctor, 2 Curt. 415; Godden v. Burke, 35 La. Ann. 160; 8 N. Y. S. 297.

² Chambers v. Queen's Proctor, *supra*. The facts were similar in Duffield v. Morris, *supra*.

³ A suicide's will is entitled to probate, notwithstanding the old law of forfeiture. Bailey, Goods of, 2 S. & T. 156.

A testator showed unjust suspicions of his wife and children amounting to an insane delusion, about the time he made his will and affecting his disposition of property. These suspicions finally culminated in his killing his wife and inflicting mortal injuries on himself. The will was denied probate. Kahn's Will, 1 Con. (N. Y.) 510. Suicide is evidence tending to show insanity. Frary v. Gusha, 59 Vt. 257.

CHAPTER VII.

DELIRIUM, DRUNKENNESS, AND DEMENTIA.

§ 121. **Delirium of Disease and its Symptoms.**—What we call delirium, or the delirium of disease, is a form of mental aberration incident to fevers and sometimes to the last stages of chronic diseases. It is mostly of a subjective character, maintained by the inward activity of the mind rather than by outward impressions. But it resembles general mania or ordinary insanity so closely that the patient will often be removed to an insane asylum for treatment; and, indeed, the mental perversion which results is so nearly identical, in the two cases, that we can do little more than ascribe the delirium of disease to the march of a bodily disorder which storms the brain, and trust that as the fever subsides and health returns, the scattered senses will rally, as after a tempest, and reason reassume her supremacy.

This febrile delirium comes on gradually, as medical experts have noticed, being first manifested by talking while asleep and by a momentary forgetfulness of persons and things on waking. Fully aroused, the mind becomes calm and tranquil, and only as he becomes drowsy does the patient retire within himself again to encounter the wild troop of fantastical images which fatigue instead of resting the disordered brain. Gradually the mental disturbance becomes more intense, the intervals of consciousness diminish and then disappear, and those at the bedside may fathom to some extent from his raving, incoherent talk what apparitions his mind is contending with. The scenes and events of the past are vividly pictured; nor is it unusual at this stage for the sick to recall some lost acquirement or talk in some forgotten language. As one returns to health and consciousness, however, scenes and sensations like these, on the whole painful and exhausting, fade in vividness, the tumult of the imagina-

tion subsides, sleep is more quiet and refreshing, the judgment works out of the bewildering fancies; and as convalescence advances, the patient remembers but vaguely the stormy scene through which he has passed.¹

Such is the usual course of febrile delirium; but the symptoms may detach themselves, so to speak, from the bodily disorder, and assume a chronic or permanent form; in which event the delirium passes into the darker phase of maniacal delirium and by a fixed disarrangement of the mental conceptions produces insanity, that painful, habitual state of incapacity, whose legal consequences are elsewhere discussed. To the delirium of disease commonly succeeds a stupor, where the disease is to end fatally; but often will the mind recover a calm and quiet condition for a considerable space before death.²

§ 122. **Delirium Incapacitates; Effect of Lucid Intervals.**—It stands to reason that the will of a person, made while he is delirious and quite out of his mind, is null if not a legal absurdity. But wills are often made in the last illness of such sufferers and during the period when one throws off his feverish delirium like a person waking from a nightmare. Where the patient is convalescent, or even in the earlier stages of a febrile disease which after much fluctuation ends fatally, the mind may no doubt be quite clear in the intervals

¹ Ray Med. Jur. 364; 1 Wharton & Stillé Med. Jur. 3d Ed. § 702 *et seq.*

² 1 Redf. Wills, 92; Ray Med. Jur. 346; 1 Wharton & Stillé Med. Jur. § 703. In 1 Wharton & Stillé the distinctive symptoms are traced out, at some length, as between febrile and insane delirium. "In ordinary diseases the sick person attaches himself with happiness to everything that tends to recall him to existence. He hears with emotion of the different stages of his disease, and of the delirium which was its consequence; he speaks often of its causes, deploras its effects, and makes innumerable excuses for any malignant

or obscene words which may have escaped him during the delirium. The patient, on the contrary, in whom the insanity is confirmed, will not admit that he was delirious. He sustains the errors of his imagination and takes them for realities. The hallucinations and delusions of all sorts which he has felt, and which still beset him, fortify him in his madness. Still more, in this he systematizes his delirium, and whatever intellectual energy is left is employed by him in establishing, upon the basis of a desperate logic, motives for the new existence which he is just commencing." 1 Wharton & Stillé, § 703

of strange dreaminess and rhapsody. The courts distinguish, therefore, where delirium only is set up in opposition to a will presented for probate, and the case of fixed mental derangement or habitual insanity. Delirium, Sir John Nicholl, an eminent authority in probate law, has observed, is a fluctuating state of mind created by temporary excitement, in the absence of which, to be ascertained by the patient's appearance, the patient is most commonly really sane. Hence, as also, indeed, from their greater presumed frequency in most instances of delirium, the probabilities, *a priori*, in favor of lucid intervals are infinitely stronger in a case of delirium than in one of permanent proper insanity; and the difficulty of proving a lucid interval is less, in the same exact proportion, in the former, than it is in the latter case, and has always been so held in the English courts of probate.¹ There are American decisions which support the same conclusion;² for delirium caused by a fever is most commonly temporary in its character, like the fever itself.

§ 123. **The Same Subject.**—But while delirium has usually the temporary character thus noticed, it sometimes, by changes almost imperceptible, passes, as we have seen, into the fixed type of mental derangement. And the testamentary transaction may still invite a careful inspection of all the attendant circumstances where the testator never wholly recovered from sickness, so as to manifest his approval of the instrument executed by the very act of keeping it intact among his papers after resuming an active contact with affairs, but, on the contrary, grew gradually worse and died.

¹ Sir John Nicholl, in *Brogden v. Brown*, 2 Add. 445. "In cases of permanent proper insanity, the proof of a lucid interval is matter of extreme difficulty, as the court has often had occasion to observe, and for this, among other reasons, namely, that the patient so affected is not unfrequently rational to all outward appearance, without any real abatement of his malady; so that, in truth and substance, he is just as insane, in his apparently rational, as he is in his visible raving fits. But the apparently rational intervals of persons merely delirious for the most part are really such." *Ib.* See also *Dimes v. Dimes*, 10 Moore P. C. 422, 426, *per* Dr. Lushington; *supra*, § 109.

² *Staples v. Wellington*, 58 Me. 453, 459; *Hix v. Whittemore*, 4 Met. 545, 546, *per* Dewey, J.; *Gombault v. Public Admr.*, 4 Bradf. 226, 239; *Clark v. Ellis*, 9 Or. 128.

Here and at the threshold of death occurs a period when the mental condition becomes fitful and untrustworthy. The patient might be calm and answer questions with the same sort of relevancy, while a close examination would reveal, notwithstanding, a drowsy and dreamy condition of the mind, quite unfit for grappling with the relations of persons and things so as to perform with due consciousness the testamentary act.

Here, as elsewhere, the standard of testamentary capacity should be applied, and this inquiry solve the doubt: namely, whether the patient, besides exercising his own volition, has sufficient intelligence to comprehend the condition of his property, his relations to those who are or naturally might be the objects of his bounty and to understand the provisions of the instrument.¹

§ 124. Delirium Tremens, and Drunkenness or Intoxication in General. — Delirium tremens is a form of mental disorder incident to habits of intemperance, whose symptoms are generally indicated by a slight tremor and faltering of the hands and limbs, restless anxiety, disturbed sleep, and a loss of appetite. As in the case of fever, uneasy slumber begets painful dreams, which pass with rarer intervals into an exhausting delirium. Refreshing sleep, aided by good medical treatment, may operate a cure, but the disease sometimes ends fatally. A more positive mental derangement is found to occur not unfrequently in connection with intemperate habits; thus, hard drinking may produce a paroxysm of maniacal excitement or a host of hallucinations and delusions; but most commonly, after a few days' abstinence, the ordinary mental condition, though feeble, perhaps, will ensue. In the lighter stages of intoxication, however, drink or some drug like opium will produce a condition of lethargy or excitement, as the case may be, which, variable by turns or temperament, steals away the faculties for the time being, and yet leaves it often very doubtful whether or not a sound and conscious mind still operated behind the mask of folly.

¹ *Supra*, § 68.

While such delirium or derangement lasts, discretion is overwhelmed in a temporary madness, and no testamentary disposition committed under its influence can avail; provided, of course, that one's mental condition fails under the tests which apply to other delirium and other forms of insanity. The real difficulty is found where the less positive disorder of the faculties, which results from mere intoxication, has to be considered in this connection.¹ For the incapacity produced by drink is more strictly temporary than the delirium of disease, and when the fit is off, reason acts as before.²

§ 125. **The Same Subject: Drunken Habits may impair the Reason.** — Aside from the raging delirium of which we have spoken, and which is found so often temporary, a long-continued habit of inordinate indulgence in the use of stimulants may, in certain temperaments, produce another sort of insanity. The mind becomes gradually impaired, the memory fails, and the drunkard sinks into that sottish condition where his faculties are stupefied, and he may be pronounced utterly incapable of managing his own affairs.³ Victims of intemperance like these are, under some of our local statutes, subject to guardianship, where their estates might otherwise be squandered; for were it otherwise, testament or no testament would

¹ Taylor Med. Jur. 656; 1 Whart. & Stillé, §§ 201, 639; Ray Med. Jur. 438. Drunkenness and delirium tremens are more commonly considered as affecting responsibility for crime. In general, insanity which is produced by delirium tremens affects civil responsibility in the same way as insanity produced by any other cause; though here it is observable more positively than elsewhere, that the insanity was brought on by the person's own misconduct—a consideration which, in fact, appears to affect the rule of legal responsibility as defined in cases of crime committed during mere intoxication. See Wharton & Stillé, *supra*; 5 Mason, 28; 1 Curt. C. C. 1.

Swinburne thus discriminates upon the subject of testamentary incapacity

as affected by drunkenness. "He that is overcome by drink, during the time of his drunkenness is compared to a madman, and therefore, if he make his testament at that time, it is void in law, which is to be understood, when he is so excessively drunk that he is utterly deprived of the use of reason and understanding; otherwise, if he be not clean spent, albeit his understanding is obscured and his memory troubled, yet he may make his testament, being in that case." Swinb. pt. 2, § 6.

² 1 Redf. Wills, 163; Ayrey v. Hill, 2 Add. 206. Insanity, it is said, is often latent, but ebriety never. *Ib.*

³ Starret v. Douglas, 2 Yeates, 48; Duffield v. Morris, 2 Harring. 375, 383. And see McSorley v. McSorley, 2 Bradf. 188.

be of little consequence. Sometimes, but not invariably, a permanent, fixed, and incurable insanity is developed by the drunken habit, especially if other causes predispose the mind in that direction.¹

But ordinarily this is not so when other predisposing causes are absent, for the mind of the most confirmed inebriate is generally capable of transacting common business in its sober moments.

§ 126. **When Intoxication invalidates a Will, and the Reverse.**—The fact that the testator was intoxicated, or under the influence of some drink or drug at the time he made his will, does not of itself avoid the disposition, if the intoxication or stimulus does not prevent him from comprehending intelligently what he is doing.² Nor is habitual drunkenness or the frequent and injurious use of ardent spirits or drugs of itself sufficient to invalidate a will, even though the person so addicted may have acted like a madman while intoxicated.³ For the state of mind at the time of executing the will in question is the material issue; and if the testator be then in a condition to understand what he is about, his capacity is presumed.⁴

On the other hand, the wills of those far gone in intemperate habits should be watchfully regarded; for such persons are even more liable to imposition in transactions of this kind than to dispose irrationally without dictation. If the mind is not clouded simply, but actually deprived of reason

¹ A will made by a habitual drunkard while subject to a committee or guardian is not for that reason void; but, at most, there is only *prima facie* evidence of incapacity afforded by the appointment of a committee or guardian; nor does the record always furnish even *prima facie* evidence. *Lewis v. Jones*, 50 Barb. 645; 57 Cal. 529; *Leckey v. Cunningham*, 56 Penn. St. 370. And see *supra*, § 81.

² *Peck v. Cary*, 27 N. Y. 9; *Gardner v. Gardner*, 22 Wend. 526; *Pierce v. Pierce*, 38 Mich. 412; *Andress v. Weller*, 2 Green Ch. 604; *Kay v. Hollo-*

way, 7 Baxt. 575; 57 Cal. 274; 4 Dem. 501; *Frost v. Wheeler*, 43 N. J. Eq. 573; 127 Penn. St. 269; 45 N. J. Eq. 702. That the testator had delirium tremens was an element in proof of incapacity in *Edge v. Edge*, 38 N. J. Eq. 211. But delirium tremens may pass off and leave the person sane and sensible, so that his will, if made without undue influence, should operate. *Handley v. Stacey*, 1 F. & F. 574.

³ *Hight v. Wilson*, 1 Dall. 94; *Temple v. Temple*, 1 H. & M. 476.

⁴ *Peck v. Cary*, 27 N. Y. 9; *Pierce v. Pierce*, 38 Mich. 412.

or volition, if, in other words, whether by delirium or besotted faculties, or from any other cause the person at the time of executing the will is mentally incapacitated, according to the usual tests, his will is not a valid one.¹ What is here said of intoxication or drunkenness, applies not only to the use of spirituous liquors, but to the opium or morphine habit.²

§ 127. **Burden of Proof, etc., where Drunkenness is alleged.**—Where drunkenness is relied upon as establishing incapacity, —not habitual and fixed insanity, but, at the most, habitual intoxication,—the burden of proving its existence at the time of executing the will rests upon the contestants.³ Habitual drunkenness cannot alone in proof overthrow a will. Nor is the effect of drunkenness on the testator's capacity in such a contest a question for experts, or dependent upon proof of subsequent acts and conduct, but it depends on common observation and the facts of the particular case at and about the time of the transaction.⁴

All that need appear, therefore, in order to sustain the will, is the absence of intoxication, at the time of making it, in any such degree as would, by the usual tests, vitiate the disposition.⁵ If the testator was at the time capable of knowing what he was about, it is to be presumed that he did know, and that the disposition was his voluntary and intelligent act. Where one's indulgence has produced habitual and fixed derangement of the reason, proof of a lucid interval or a return to the sane condition would, under the general rule, be needful; but otherwise, the law infers readily, in the absence of evidence to the contrary, that, though intoxicated

¹ *Gardner v. Gardner*, 22 Wend. 526; *Duffield v. Morris*, 2 Harring. 375; *Temple v. Temple*, 1 H. & M. 476; *Barrett v. Buxton*, 2 Aiken, 167; *Julke v. Adam*, 1 Redf. 454.

² The will of a testatrix was sustained in a recent case notwithstanding she was shown to have been addicted to the use of morphine; it appearing that when not under the influence of morphine her mind was clear and that she made her will accordingly. *Frost v.*

Wheeler, 43 N. J. Eq. 573. But the court justified a contest of the will where such habits existed and ordered the costs of litigation paid from the estate. *Ib.* As to morphine, see further, *Bush v. Lisle* (Ky.).

³ *Andress v. Weller*, 2 Green Ch. 604, 608; *Lee v. Case*, 46 N. J. Eq. 193.

⁴ *Pierce v. Pierce*, 38 Mich. 412; *Gibson v. Gibson*, 24 Mo. 227.

⁵ See *Ayrey v. Hill*, 2 Add. 206; § 126.

sometimes to madness, he was in his right mind when he made his last testament.¹

§ 128. **The Rule of Testamentary Capacity in Drunkenness illustrated.** — How strongly our courts incline in these times to sustain a just and natural will, even where the testator is admitted to be a confirmed drunkard, is illustrated by some of the latest cases. In New York the will of a man notoriously intemperate was, in 1863, adjudged by the court of appeals admissible to probate, though executed after a protracted debauch of five days. The proof showed that he had at the time of execution recovered from the immediate effects of the debauch, speaking of it as a matter of the past, though continuing to drink in the course of the same day, while preparing to take a voyage, which was the occasion of his will; and no extravagance or insane conduct contemporaneous with the will was shown.²

In this case, we may add, the court laid much stress upon the obvious circumstance that there was nothing unnatural or unreasonable in the will itself; that it was properly executed; and that the persons who were present at the very time of the testamentary act — one of whom was, from previous knowledge and present observation, an eminently competent witness — saw nothing in the testator indicating a want of ordinary intelligence or entire sanity.³

§ 129. **Dementia as distinguished from Mania or Delirium.** — To speak now of dementia, or that form of insanity which is marked by mental feebleness and decrepitude, so that reason flickers low in the socket and then dies out. Between idiocy and dementia the analogy is strong; nor is the word "imbecility" unfrequently applied in the present connection without taking in congenital defect as a necessary element. Whether we speak of imbecility in this broad sense, or use

¹ Ayrey v. Hill, 2 Add. 206; Gardner v. Gardner, 22 Wend. 526; Peck v. Cary, 27 N. Y. 9.

² Peck v. Cary, 27 N. Y. 9. Cf. McSorley v. McSorley, 2 Bradf. 188.

³ 27 N. Y. 24. And see Stebbins v.

Contradictory testimony on such points may properly be left to a jury.

Best v. Best (Ky.).

Hart, 4 Dem. 501.

the more technical term "dementia," we subordinate the idea of impediments, which birth or infancy may have opposed to one's normal development, and view mainly the breaking down of the natural faculties, gradual and insensible, usually, but sometimes rapid and sudden. But from idiocy, whose proper type is always the abnormal from birth, dementia is well distinguished;¹ their resemblance consisting in this, — that in extreme cases, no ray of human intelligence is visible, but all is darkness.

Dementia, we distinguish from general mania or delirium, in that depression of the mental powers produces the former condition, but exaltation, the latter. In mania, force, hurry, and intensity mark the action of the mind; in dementia, slowness and weakness;² nevertheless, dementia appears often to be a sequel of mania, by a sort of relapse and exhaustion of nervous influence; and many regard it as the natural termination of insanity, a final period rather than a true form of mental unsoundness, — in a word, the tomb of reason.³

§ 130. **Senile Dementia, or the Mental Decay of the Aged:**
Litigation on this Ground. — Dementia is sometimes found in

¹ *Supra*, c. 5.

² 1 Wharton & Stillé Med. Jur. § 698.

³ 1 Wharton v. Stillé, § 700, citing M. Falret.

"The reasoning of the maniac," observes Dr. Ray, "does not so much fail in the force and logic of its arguments, as in the incorrectness of its assumptions; but in dementia the attempt to reason is prevented by the paucity of ideas, and that feebleness of the perceptive powers, in consequence of which they do not faithfully represent the impressions received from without. In mania when the reason fails, it is because new ideas have crowded into the mind and are mingled up and confounded with the past; in dementia, the same effect is produced by an obliteration of past impressions as soon as they are made, from want of sufficient power to retain them. In the former, the mental operations are char-

acterized by hurry and confusion; in the latter, by extreme slowness and frequent apparent suspension of the thinking process. In the former, the habits and affections undergo a great change, becoming strange and inconsistent from the beginning, and the persons and things that once pleased and interested, viewed with indifference or aversion. In the latter, the moral habits and natural feelings, so far as they are manifested at all, lose none of their ordinary character. The temper may be more irritable, but the moral disposition evinces none of that perversity which characterizes mania. In dementia, the mind is susceptible of only feeble and transitory impressions, and manifests little reflection even upon these. They come and go without leaving any trace of their presence behind them." Ray, *Insanity*, 292.

the young as a form of insanity not incurable ; but its most common type occurs in old persons, whose mental powers begin to break down in advance of the physical. This mental decay of the aged is known as senile dementia ; and it is upon the allegation of insanity of this kind that wills are most often contested ; or rather, we should say, upon the ground that the testator, while thus weakening in intellect and volition, was, if not absolutely incompetent, unduly constrained and influenced, at all events, to make the testament which others framed for their own ends.

This form of dementia similarly invites litigation and doubt : for, unlike the dementia of the young, which is too patent to admit of question, senile dementia differs greatly both in the process and progress of decay. Medical observers tell us that it cannot be described by any positive characters ; that in its gradual advance to utter incompetency it embraces a wide range of infirmity, varying from simple lapse of memory to complete inability to recognize persons or things ; that often the mental infirmity of the aged is by no means as serious as might be supposed at first sight, and that, to use a figure of speech, the mind may be superficially rotted while it is sound at the core. Most of us have known some person heavily weighted with years and infirmity, who seemed scarcely conscious of what was passing around him ; who was quite oblivious of names and dates, and committed childish breaches of decorum before our guests ; and yet, when spurred up on occasion, when encountering some object which aroused a deep interest, or, what is most pertinent to our subject, when touched upon the affairs of money, investments, and the family relation, showed a clear, acute, and vigorous comprehension. Younger members of the household watch for signs of mental failure in persons like these, and confess that often the signs deceive them. And once more, senile dementia, where the mind has surely tottered, blends so often the consequences of imprudent habits, of physical disorders seated in the system, of indulgence in drink, of some peculiar bias of character or temperament, of delusions or other predisposition to insanity, with those of natural decay

in old age, that a confused array of proofs is offered by those who would break down the testament, so-called, of the superannuated.¹

§ 131. **The Same Subject: when the Mind begins to decay.**—Persons differ greatly both in mental and physical resources after passing the meridian of life; some declining rapidly, others by degrees almost imperceptible. In one the intellectual functions operate with healthy precision far into the vale of years, the power of volition dominating over the ills of the flesh; in another the loss of mental power and energy seems to precede the loss of physical strength; but probably in a majority of cases, both mind and body begin to fail together soon after the prime of life is reached. We detect more easily when the bodily vigor and elasticity of mature life show signs of departure than we do the approach of mental feebleness; in the former respect an old person admits his lapse, while he persistently deceives himself and others in the latter; moreover, as Judge Redfield has well observed by way of comparison, our uncertainty in estimating the powers of the mind is the greater, since the increase of experience and knowledge which time produces at all stages of advancing life compensates for the decline of the mental faculties and powers.² Judges, clergymen, and literary writers, whose minds have been constantly trained and disciplined, and their circumstances such that brain work may proceed without worry, retain in many instances the capacity for intellectual labor, of the reasoning rather than imaginative sort, to a ripe old age.

§ 132. **The Same Subject: Loss of Memory One of the First Symptoms of Mental Decay.**—One of the first as well as of

¹ The late Chief-Justice Redfield, in his valuable treatise on wills, evidently considers the imbecility of old age, or senile dementia, as the most difficult and important subject connected with testamentary capacity. "There is probably no form of mental unsoundness," he says, "which has to be considered so often in connection with testamentary

cases, or which has so important a bearing upon, or the thorough comprehension of which is so much to be desired, as an aid toward the correct understanding of such cases, as that of the imbecility of old age, or senile dementia."

¹ Redf. Wills, 94.

² ¹ Redf. Wills, 95.

the surest symptoms of mental decay is the loss of memory ; and especially in respect of names and dates ; yet, oblivious as an old person might appear in such matters, his mental grasp of the relations he sustains to others and of his own interests and affairs, his capacity and solid understanding, may still remain firm.¹ At the same time it is admitted that the faculty of remembering, like capacity itself, lasts much longer in some persons than in others.

This failure of memory is not enough to create testamentary incapacity, aside from fraud, force, and error, unless it extends so far as to be inconsistent with the "sound and disposing mind and memory" requisite for all wills ; or, in other words, unless the mind is incapable of grasping the details of testamentary disposition, and the memory is defective in essentials.²

§ 133. **The Same Subject: Casual Observers Untrustworthy as compared with those Familiar with the Testator.** — It follows from what we have thus briefly observed of senile dementia in its general aspect, that the impressions of mental condition made upon casual or ignorant observers are untrustworthy and of very little consequence in such cases as compared with those of persons who have been well acquainted with the habits and character of the individual, and have often had occasion to test the vigor of his faculties. The impressions, for instance, which constant medical advisers have derived, intelligent nurses, familiar visitors and friends of the family, and, allowing for the bias of personal interest, the family and immediate kindred themselves.

§ 134. **Senile Dementia disqualifies One from making a Will but not Old Age Alone.** — Senile dementia, as one form or development of insanity, disqualifies a person from making a

¹ *Kinleside v. Harrison*, 2 Phillim. 449, 457; *Van Alst v. Hunter*, 5 Johns. Ch. 148, 158; 1 Redf. Wills, 95. To quote from Dr. Ray, an eminent authority upon insane symptoms: "The great point to be determined is, not whether he was apt to forget the names of people in whom he felt no particular

interest, nor the dates of events which concerned him little; but whether, in conversations about his affairs, his friends and relatives, he evinced sufficient knowledge of both, to be able to dispose of the former with a sound and untrammelled judgment." Ray Med. Jur. 336.

² See *Bleecker v. Lynch*, 1 Bradf. 458.

will; but old age alone does not.¹ The law places an arbitrary limit, so that those not arrived at a certain age are conclusively incapable of the testamentary act; but no such limit confronts the other extreme of human life. For a man (as Swinburne has expressed it) may freely make his testament, how old soever he be; since it is not the integrity of the body, but of the mind, that is requisite in testaments. Yet (he adds) if a man in his old age becomes a very child again in his understanding, or rather in the want thereof, or by reason of extreme old age, or other infirmity, is become so forgetful that he knows not his own name, he is then no more fit to make his testament than a natural fool, or a child, or lunatic person.² By which statement we are not to understand that the minor child and the superannuated child are measured in legal capacity by the same simple standard of arithmetical reckoning; nor that the conclusive test of infirmity in old age must depend necessarily upon the testator's recollection of one name or another.

The learned Chancellor Kent, who, as a professional instructor and author of the famous Commentaries on American Law after his enforced retirement from the bench at the age of threescore, furnishes a conspicuous example to posterity of the error legislation is sure to commit whenever it undertakes to assign an absolute limit to mental capacity for affairs and usefulness in the public service, not to add as a private citizen, made some fitting observations concerning the wills of old persons in a case which once came before him for decision. Regarding it as a fortunate circumstance for themselves that the aged have the power to dispose of their own property, "it is," he says, "one of the painful consequences of extreme old age that it ceases to excite interest, and is apt to be solitary and neglected. The control which the law still gives to a man over the disposal of his property is one of the most efficient means which he has in protracted life to command the attentions due to his infirmities."³

¹ Swimb. pt. 2, § 5, pl. 1; Bird v.

Bird, 2 Hagg. 142; Van Alst v. Hunter,

5 Johns. Ch. 148; cases in sections

infra.

² Swimb. pt. 2, § 5, pl. 1.

³ Van Alst v. Hunter, 5 Johns. Ch.

148, 158.

§ 135. **Wills of the Aged should be tenderly regarded.**—“The will of such an aged man,” adds the Chancellor in this same opinion, “ought to be regarded with great tenderness, when it appears not to have been procured by fraudulent acts, but contains those very dispositions which the circumstances of his situation and the course of the natural affections dictated.”¹ We may contrast the delicate feeling shown to the feeble in language like this, with the harsh and grating tone of early text-writers like Swinburne, when they touch upon testamentary incapacity as produced by mental unsoundness.² But Chancellor Kent himself, it is here perceived, does not contend that an old person’s will should receive tender consideration when unfairly extorted by others, or unjust and unnatural in its disposition of the estate.³

§ 136. **The Same Subject.**—Other American decisions proceed upon the same view of old age in its effect upon testamentary capacity. “Great age alone,” observes Surrogate Bradford, in the course of a long and carefully considered opinion, “does not constitute testamentary disqualification; but, on the contrary, it calls for protection and aid to further its wishes, when a mind capable of acting rationally, and a memory sufficient in essentials are shown to have existed, and the last will is in consonance with definite and long-settled intentions, is not unreasonable in its provisions, and has been executed with fairness.”⁴ “There is no presumption against a will,” says Andrew, J., reiterating the New York rule on this subject, “because made by a man of advanced age, nor can incapacity be inferred from an enfeebled condition of mind or body. Such a rule would be dangerous in the extreme, and the law wisely sustains testamentary dispositions made by persons of impaired mental and bodily powers, provided the will is the free act of the testator, and he has sufficient intelligence to comprehend the condition of

¹ Van Alst v. Hunter, 5 Johns. Ch. 148.

² Swimb. pt. 2, § 5, pl. 1, *supra*.

³ See *supra*, § 77.

⁴ Maverick v. Reynolds, 2 Bradf. 360. And see Bleecker v. Lynch, 1 Bradf.

458; Snyder v. Sherman, 23 Hun. 139.

his property, and the scope, meaning, and effect of the provisions of the will.”¹

Eminent English authority is to the same effect. “The law,” observes Sir John Nicholl, “allows a person at any age to make a will, provided he retains the disposing faculties of his mind;” and he adds, that age is an uncertain criterion of mental powers.² And Chief-Justice Cockburn approves in a late English case the idea that though mental power be reduced in old persons below the ordinary standard, yet if the testamentary act is understood and appreciated in its different bearings, if the mental faculties retain sufficient strength freely to comprehend the transaction entered upon, the power to make a will remains.³

§ 137. **Instances in which Wills of the Aged have been sustained.**—Instances from the reports will serve to illustrate the principle we are considering. In a leading English case, Sir John Nicholl in 1818 admitted to probate the will and codicils of a man who had executed the latter instruments when from eighty-six to eighty-eight years old, and died at about ninety; and this notwithstanding proof that the testator had sometimes been *non compos* from violent nervous attacks while at this advanced stage of life.⁴ In Chancellor Kent’s opinion, which we have quoted, the will upheld was made by a person between ninety and one hundred years old.⁵ In a New Jersey case a will was sustained, although the testator was eighty years of age, very deaf, and troubled with defective eyesight when he made it.⁶ In Kentucky,

¹ Horn v. Pullman, 72 N. Y. 269, 276 (1878). The Pennsylvania doctrine confirms the rule advanced on this point in New York, and the court makes reference in a recent case to the general test of capacity in those enfeebled by age, sickness, or extreme distress or debility of body. “To sum up the whole in the most simple and intelligent form: Were his mind and memory sufficiently sound to enable him to know, and to understand, the business in which he was engaged at the time

when he executed the will?” Wilson v. Mitchell, 101 Penn. St. 495, 503, citing other cases upon testamentary capacity. And see 5 Houst. 435.

² Kinleside v. Harrison, 2 Phillim. 449, 461.

³ Banks v. Goodfellow, L. R. 5 Q. B. 549, 566. And see Bird v. Bird, 2 Hagg. 142.

⁴ Kinleside v. Harrison, 2 Phillim. 449.

⁵ Van Alst v. Hunter, 5 Johns. Ch. 148.

⁶ Lowe v. Williamson, 1 Green Ch.

another testator of about the same age, was so afflicted with the palsy that he could neither read nor feed himself; yet his will was adjudged a valid one;¹ and so with a person eighty-six years old in greatly impaired health.²

In one New York case a will was vigorously contested where the testatrix was ninety years old; but no proof of mental unsoundness appearing, and the will itself appearing not only a reasonable one, but in substantial accordance with one executed by her several years before, and also with her repeatedly declared intentions concerning the disposal of her property, and that when made it was carefully read and explained, the will was established.³ In another case the court of appeals sustained the will of a widower, eighty-three years old, which gave the bulk of his estate to a grandson who had taken good care of the testator during his declining years, and bestowed only five dollars each upon six adult children, who, though on friendly terms with their father, had seldom visited him in his old age and had declined to let him live with them.⁴ And there is a recent Pennsylvania case where the will of an old man was adjudged good though he was more than a hundred years old when he made it; blind, partly deaf, and weakening in his memory.⁵

§ 138. **The Same Subject: Circumstances favoring Probate of the Will.**—In these and other instances of the kind, it will be found that considerations like those adduced in corresponding cases where testamentary capacity is litigated, may serve to turn the scales where doubt exists. The will is just and reasonable, or at least not positively the reverse; it regards the natural claims of family and kindred, if there be such; it was read over and explained, or at least was apparently well understood at the time of execution; it was care-

82. And see 32 N. J. Eq. 701; Sharp's Appeal, 134 Penn. St. 492.

¹ Reed's Will, 2 B. Mon. 79.

² Watson v. Watson, 2 B. Mon. 74.

³ Maverick v. Reynolds, 2 Bradf. 360. And see Bleeker v. Lynch, 1 Bradf. 458.

⁴ Horn v. Pullman, 72 N. Y. 269.

⁵ Wilson v. Mitchell, 101 Penn. St.

495. And see Wood's Estate, 13 Phila. 236; Snyder v. Sherman, 23 Hun. 139; Vedder Re, 6 Dem. 92; 4 Dem. 501 (where the testator was eighty years old and a hard drinker); Silverthorn's Will, 68 Wis. 372; 72 Iowa, 515; 1 Con. (N. Y.) 18, 373.

fully executed. Wherever it appears that the testator, while clearly competent, gave instructions for such a will, or otherwise showed by conduct prior or subsequent to the execution, that the disposition in question was such as he and not others deliberately planned, this circumstance should bear very strongly in favor of the probate.¹ It matters little that the testator judged harshly of a person, if that person had no natural claims upon the testator's bounty.² General prudence and good sense in the management of one's own business affairs and consistent affection, are of course strong circumstances for upholding the wills of the aged.

§ 139. **Extreme Old Age suggests Vigilance in Probate; Mental Imbecility vitiates.**—But a tender regard for the aged requires not only that their intelligent dispositions should be upheld, but that their unintelligent ones, or wills not really their own, should be set aside. It is said that extreme old age raises some doubt of capacity, but only so far as to excite the vigilance of the court;³ by which, we presume, is only meant that vigilance ought to be exercised.⁴ Should the probate be contested in a case where no insanity has either existed or been supposed to exist, the inquiry as to capacity

¹ See *e.g.* *Maverick v. Reynolds*, 2 Bradf. 360. If the aged person has no near kindred at all, no persons with natural claims upon him, his bounty may naturally be directed to other persons or objects. See *Wood's Estate*, 13 Phila. 236. And it is held that, conceding a testator of eighty-two to be miserly, squalid, dishonest, profane, and irascible, one who has revoked suddenly his promises of bounty to others, this does not establish testamentary incapacity nor disqualify him from giving the bulk of his estate to his executors in trust to reduce the national debt; there being no legitimate kindred of his to be disinherited or disappointed. *Lewis Re*, 33 N. J. Eq. 219.

Forgetfulness on minor matters at the age of eighty-three is of little consequence when it is shown that the testa-

trix held clearly in mind the names of a great many of her legatees, mentioned those omitted when the draft was read over to her by the scrivener, and carefully and intelligently supervised the contents of the instrument before executing it. *Merrill v. Rush*, 33 N. J. Eq. 537. And see 32 N. J. Eq. 701.

² *Lewis Re*, 33 N. J. Eq. 219; *Merrill v. Rush*, *ib.* 537. Harsh conduct, as establishing an insane delusion in the testator's mind, will be treated in the next chapter.

³ *Kinleside v. Harrison*, 2 Phillim. 449, 461, *per* Sir John Nicholl.

⁴ Observe the context, *ib.* In this case the will was actually sustained. There is no presumption against a will simply because of old age. *Horn v. Pullman*, 72 N. Y. 269.

(aside from undue influence) is simply whether the mental faculties retained sufficient strength to comprehend fully the testamentary act about to be performed. But when lunacy or unsoundness of mind has previously existed, the investigation is of a far more searching and thorough sort, for a prejudice at once obstructs the probate.¹ There can be no question that mental imbecility, whether arising from old age or any other cause or complication of causes, destroys testamentary capacity. And undue influence, especially such as constrains by fear, must be regarded with great disfavor in all instances under the present head.²

§ 140. **Instances in which Wills of the Aged have not been sustained.**—Where a will and codicil were executed by a person eighty years of age, and neither of the subscribing witnesses to the two instruments testified favorably to his mental capacity, but one thought him not of sound mind, the surrogate refused probate of the instruments, and this decision was affirmed on appeal to the supreme court.³ In Kentucky the alleged will of a man about seventy years, who was confined to his bed by an inflammatory disease of a very distressing sort, which made him frequently both drowsy and flighty, and died two days later, was refused probate; and this chiefly, as it would appear, because the will showed gross inequality in its dispositions, and was only made after the teasing importunities of the testator's wife.⁴ In Missouri was set aside an instrument propounded as the will of an old lady about seventy-three years of age who had grown childish and irritable; not so much, however, on the ground of incapacity, as because a stranger in blood, who had acquired a strong influence over her, procured the will in his own favor regardless of her own immediate relations, who were all poor.⁵

¹ See *Prinsep v. Dyce Sombre*, 10 Moore P. C. 278.

² *Hartman v. Strickler*, 82 Va. 225; 43 N. J. Eq. 154; c. 10, *post*.

³ *Dumond v. Kiff*, 7 Lans. 465. The report on appeal does not exhibit the proof in detail; but an important circumstance unfavorable to capacity was

that the testator, a few months after these papers were executed, did not know his own children, inquired how many he had, and could only name some of them.

⁴ *Harrel v. Harrel*, 1 Duv. 203.

⁵ *Harvey v. Sullens*, 46 Mo. 147.

And in a New Jersey case, where one made a sudden, unjust, and unaccountable change of disposition, evidence that he was eighty years old, that he had suffered in his mind from sunstroke, that he had had delirium tremens, that he was under a delusion that his wife and son (with whom the will dealt inequitably) were trying to kill him, and that other persons were trying to rob him, — all this was held satisfactory proof of his testamentary incapacity.¹ Stupor and forgetfulness of the aged person at the time of execution, are unfavorable circumstances, especially if sinister agencies are shown to have been active in procuring the testament, and death soon intervened after the instrument was executed.²

§ 141. **Rule of Capacity for Dementia not Different from that for Mania.** — It is thus perceived that the legal principles by which courts are governed in testamentary causes differs not essentially, whether the alleged incapacity be produced by mania or dementia. Although the testator was aged and infirm, his will as a rule may be established, if at the time of making it, he had sufficient intelligence to comprehend the condition of his property and his relations to those who were or might naturally be the objects of his bounty, and to understand the provisions of the instrument.³ If the will itself is fair and natural, and especially if it be shown to coincide in terms with the deliberate purpose announced by the maker when in sounder health, if it shows no indications of fraud or undue influence, — if in short it is a rational act rationally performed, it will be upheld as valid, and very properly so, although his mind may have been considerably impaired by the time of its execution.

§ 142. **Opinions as to the Capacity of an Aged Testator carry no Great Weight in Doubtful Cases.** — When the testator is far advanced in years, and occasional incapacity is produced by sickness, intemperance, or other cause, so that the case is a

¹ *Edge v. Edge*, 38 N. J. Eq. 211.

² See *Cockrill v. Cox*, 65 Tex. 669; 115 Ill. 11; 80 Va. 293.

³ *Supra*, § 68.

complicated one, and the evidence a mass of crude and contradictory evidence, but little weight attaches to the mere opinion of witnesses.¹ The basis of such opinions is liable to vary exceedingly ; and moreover, as Sir John Nicholl has pointed out, differences will arise from the different abilities of the witnesses to form such opinions, from their different opportunities of seeing the person, and from the different state and condition of the testator's mind at different times.² Especially does this hold true of casual and unskilful observers ; for, as already shown, it is only those well acquainted with the patient and his idiosyncracies, whose impressions at this stage of his life can be trusted.³

¹ *Kinleside v. Harrison*, 2 Phillim.
449.

² *Kinleside v. Harrison*, 2 Phillim.
449, 457.

³ *Supra*, § 133.

CHAPTER VIII.

MONOMANIA AND INSANE DELUSIONS.

§ 143. **Monomania a Preferable Term to Partial Insanity ; the Mind a Unit.** — That type of insanity which remains finally to be considered bears at present the name “monomania.” “Partial insanity” was the term formerly applied, by way of distinguishing it from general derangement of the mind ; but the best of modern medical psychologists now repudiate that mode of distinction as artificial, one which leads, moreover, to lax and pernicious theories upon the subject of moral responsibility. The individual mind, they teach us, is properly regarded at all events, as a unit and indivisible ; not with moral and mental functions lodged in separate cells, so that one can be insane in one function but not in another, so that a man might have an insane propensity to kill or steal, for instance, for which he was irresponsible, and yet be sane in other respects ; nor with subdivided cells for various mental faculties, all capable of working apart and independently of one another.¹

If this later exposition be the true one, not only “partial insanity,” but “moral monomania,” with its confusing list of crimes which should be pitied but not punished, falls into disrepute. Nevertheless, the word “monomania” in an intellectual sense, and as applied to testamentary instruments, holds its footing in the courts. Even “partial insanity” might be quite as unobjectionable a term, were it used under like limitations.²

¹ Wharton & Stillé, Med. Jur. §§ 567–571.

² In *Dew v. Clark*, 1 Add. 279; 3 Add. 79, Sir John Nicholl, one of the oldest probate judges in English annals, observed as follows on the subject of partial insanity: “It was said

that ‘partial insanity’ was unknown to the law. The observation could only have arisen from mistaking the sense in which the court used that term. It was not meant that a person could be partially insane and sane at the same moment of time: to be sane, the mind

§ 144. **Monomania defined; how distinguished from Eccentricity; Insane Delusions.**—Monomania, so called, may consist in mental or moral perversion, or in both. It is the former phase which is chiefly presented in cases where the issue of testamentary capacity is involved. We may here define it as insanity only upon some particular subject or class of subjects; and as insanity in general is manifested by delusions, so in the present connection there appears in strictness but a single insane delusion, an insanity upon some particular subject or class of subjects, while in other respects the mind appears to retain its normal powers.

Insane delusion is thought to consist essentially in believing that to be true, or to exist, which no man in his senses can admit.¹ This very standard of comparison, however, namely,

must be perfectly sound; otherwise it is unsound. All that was meant was, that the delusion may exist only on one or more particular subjects. In that sense the very same term is used by no less an authority than Lord Hale, who says: 'There is a partial insanity of mind and a total insanity. The former is either in respect to things [*quoad hoc vel illud insanire*—some persons that have a competent use of reason in respect of some subjects, are yet under a particular dementia in respect of some particular discourses, subjects, or applications], or else it is partial in respect of degrees; and this is the condition of very many, especially melancholy persons, who, for the most part, discover their defect in excessive fears and griefs, and yet are not wholly destitute of the use of reason; and this partial insanity seems not to excuse them in the committing of any offence for its matter capital; for, doubtless, most persons that are felons of themselves, and others, are under a degree of partial insanity when they commit these offences.' It is very difficult to define the invisible line that divides perfect and partial insanity; but it must rest upon circumstances duly to be weighed and considered both by judge and jury,

lest on the one side there be a kind of inhumanity towards the defects of human nature; or, on the other side, too great an indulgence given to great crimes."

Cf. Lord Brougham's criticism of the expression "partial insanity," which he says would be better described by the phrase "insanity" or "unsoundness," always existing, though only occasionally manifest. *Waring v. Waring*, 6 Moore P. C. 349.

¹ A delusion in medical jurisprudence is "a diseased state of the mind in which persons believe things to exist, which exist only, or to the degree they are conceived of only, in their own imaginations, with the persuasion so fixed and firm that neither evidence nor argument can convince them to the contrary." *Bouv. Dict.* "Delusion"; *Robinson v. Adams*, 62 Me. 369, 401. "The correct principle is, that whenever a person imagines something extravagant to exist, which really has no existence whatever, and he is incapable of being reasoned out of his false belief, he is in that respect insane; and if his delusion relates to his property, he is then incapable of making a will." *Benoist v. Murrin*, 58 Mo. 307, 323.

It is misleading and inaccurate to use

the average man in his average range of mind, is far from fixed and positive. Men have been thought under an insane delusion who saw clearly in advance of their age ; and it is not so long since that any one who believed it possible for distant cities to hold converse by means of the electric wire would have been set down by the mass of his fellow-men as a monomaniac. The world itself is deluded by its own imperfect experience of things, by errors, by superstition, by dreams. A morbid state of mind, a strange perversion on particular subjects, is, nevertheless, to be detected frequently in some individual ; it is a symptom often of general derangement soon to follow ; or, again, it remains fixed as the last discoverable symptom, after some mental disorder of greater scope appears to have passed away.

It is generally admitted that the degrees of morbid derangement, of so-called monomania, vary very greatly in particular cases ; one person showing great sagacity and mental acuteness on all subjects out of the range of his peculiar infirmity, while another has well-nigh lost altogether the balance of his faculties. But, while some who are less affected seem to conceal their delusion from the world with considerable skill and art, the monomaniac more commonly shows himself quite unconscious that his particular hallucination separates him from the mass of mankind and provokes the comment that he is crazy. This it is, as reputable writers assert, which most distinguishes monomania from eccentricity or any mere oddness of opinion ; for the odd or eccentric man admits his peculiarity, but persists in his course from choice and in defiance of public sentiment, while one laboring under the insane delusion admits neither error nor singularity on his part, but seems persuaded that he is guided by the most judicious of counsel.¹ His insanity puts on the aspect of a sort of supernatural sanity, and by this is most easily detected. Yet, even here, how liable is it to happen that where one pursues some

insanity and delusion as convertible terms ; for there are delusions which sane minds have entertained ; while in that decaying state of the intellect known as dementia, or in imbecility, the

insane mind is often too feeble to manifest delusions of any appreciable consequence at all.

¹ Taylor Med. Jur. 626, 629 ; 1 Redf. Wills, 72.

mistaken fancy, or delusion, but not an insane one, the more he insists that he is rational, the more are others misled to believe that he is out of his mind, and an indignant denial of insanity is taken as proof positive of derangement until a mutual explanation reveals the false premises upon which his course of action was based.¹

§ 145. **The Same Subject: Eccentricity further distinguished.** — It is further to be remarked, as between insanity and eccentricity, that the latter is traced down as a natural and gradual growth of habits and character in an individual under the peculiar influences which surrounded him. When the will of such a person is opened, no matter how odd its language or how whimsical its provisions, those familiar with the person pronounce it just such a document, nevertheless, as might have been expected from him. But the will of an insane person, on the other hand, shows rather a perversion of mind, an alienation of feeling, astonishing, unaccountable, and strangely at variance with his natural character while in sound health. External causes account for eccentric but not for insane behavior.

Eccentricity signifies in many cases an insane predisposition; and where the eccentric habit is suddenly acquired, starting up without a growth, or where one's whole nature seems to have become quickly perverted so as to run back, as it were, in an opposite channel, we may well suspect that insane delusion is at work.²

A person may be eccentric, and so predisposed to insanity as to become decidedly deranged at some periods of life, and yet at other times so remitted to the former state of mere eccentricity as to be pronounced capable of making a will. Such was the case of the testatrix in *Mudway v. Crofts*, whose will nevertheless Sir Herbert Jenner Fust admitted to probate, upon proof that she was laboring under no delusion or derangement when she made it. Her father, it

¹ The instance of Malvolio in the "Twelfth Night" serves as a ready illustration in point.

² See 1 Redf. Wills, 85; Taylor Med Jur. 632, 656.

appears, died when she was seven years old; her mother was of secluded and penurious habits, to which she herself was brought up; but although eccentric in her manners, and ill educated, she was acute in business, conducted her own affairs, managed her own investments, gave intelligent directions to her legal advisers, and showed herself quite tenacious and clear-headed as to her legal rights. Eccentricity, the court observed, involves a greater susceptibility than usual to mental derangement; but still it is not mere strangeness of conduct or singularity of mind which constitutes the presence of insanity. "It is the prolonged departure, without an adequate external cause, from the state of feeling and modes of thinking usual to the individual when in health, that is the true feature of disorder of mind." ¹

§ 146. **Insane Delusion has no Basis in Reason ; Reason and Evidence cannot dispel it.** — On the whole, the essence of an insane delusion is that it has no basis in reason, and cannot by reason or evidence be dispelled in the slightest. It is thus capable of being cherished side by side with other ideas utterly inconsistent with it.² The term "delusion" as applied to insanity must be distinguished from a mere mistake of fact, or being induced by false evidence to believe that a fact exists which does not exist.³

§ 147. **Delusions, Sane or Insane, in General.** — Delusions of one kind or another are the usual accompaniment of a deranged mind; and courts have sometimes been disposed to test one's general sanity by ascertaining whether he exhibits delusions. But what we call delusions afford a very capricious standard; and in their legal relations, as concerns testamentary capacity, Sir J. P. Wilde (Lord Penzance) in 1867 criticised severely the current definitions of English courts on the subject. A delusion is "a belief of facts which no rational person would have believed"; so spoke Sir John Nicholl; "But who," asks Sir J. P. Wilde, "is a 'rational' person? And does not the assumption 'rational' beg the question at issue?"

¹ *Mudway v. Croft*, 3 Curt. 671, 678.

² Merrill v. Rolston, 54 Redf. 220, 251; Florey v. Florey, 24 Ala. 241.

³ See § 162, *post*.

"The belief of things as realities, which exist only in the imagination of the patient;" so said Lord Brougham in *Waring v. Waring*; but do not sane people imagine unrealities? "A pertinacious adherence to some delusive idea, in opposition to plain evidence of its falsity," said Dr. Willis, as quoted by Sir John Nicholl; "but are not sane people sometimes pertinacious in error? and who is to determine what evidence is 'plain'?" And arguing hence from the inadequacy of all the definitions, Sir J. P. Wilde concluded that delusions, as *insane* delusions, ought to be proved by insanity, not insanity by delusions.¹ A later probate judge of that country admits that to test delusion by what "no rational person would have believed" is arguing in a circle, yet he considers that test a good one for practical purposes.²

§ 148. **Delusions which do not involve Mental Incapacity.** — It is not given us to penetrate into the world of dreams, nor to solve those mysteries in which a mind of strong imaginative powers and quick susceptibilities, prone to morbid depressions, may become involved, under the influence of superstitious training, long habits of self-introspection, or any such strange experience of life as gives to the character an eccentric development. But surely, many of the delusions, hallucinations, apparitions, by whatever names we may choose to call them, manifested in these and other minds, come very far short of establishing their incapacity for the usual transactions of life. An overtaxed mind tending to disease and disorder is often thus shown, to be sure; but the strain may be temporary only, and the delusion never strong enough to unseat reason or pervert the mind from its proper functions or the great task with which it wrestles. Macbeth's dagger and the ghost which appeared to Brutus before the battle are familiar among the countless examples in fiction; and for veritable history one need only refer to modern apparitions, in which men like Dr. Johnson, Lord Castlereagh, and President Lincoln believed, whose testamentary capacity it would be preposterous to dispute; or the star of destiny by which Napoleon guided his con-

¹ *Smith v. Tebbitt*, L. R. 1 P. & D. 401.

² *Boughton v. Knight*, L. R. 3 P. & D. 64.

duct at a momentous crisis.¹ The delusion may give friends cause for anxiety; but the mind, when tested, is shown quite capable of making a will or managing vast affairs.

But there are other cases in which a general morbid derangement of all or most of the organs must be admitted to exist. To these, and to the great mass of instances like those already cited, Dr. Wharton, an excellent authority among medical jurists, applies with strong approval the observations of De Boismont, on the case of a man who supposed that he had sunk all his wealth at the bottom of a well.² And he invokes on behalf of the weak and eccentric comprised in this category a portion of that tender solicitude, where the court deals with their last wills, which Chancellor Kent so touchingly claimed for old men in a passage we have already cited.³

§ 149. **Whimsical or Eccentric Behavior does not incapacitate.**—Mere whimsical behavior, or eccentricities in dress, demeanor, and habits of life, constitute no incapacity to make a will or perform any other property transaction. Isolation from social companionship engenders usually peculiarities in this direction; and the unmarried or disunited of both sexes, those whose homes have been broken up, and who find no close domestic bond such as smooths off the angles and rough edges of individual character by constant attrition, are the most prone to develop them.⁴

§ 150. **Illustrations of Eccentric Wills.**—Though the distinction between eccentricity and insanity is a positive one, abstractly considered, courts have not in all cases applied it

¹ These historical illustrations are set forth at length in 1 Wharton & Stillé, §§ 52-57.

² "It may be asked whether, in the state of mind in which the patient was, whose history we have related, he was capable of making a will. This is a very difficult question; but its solution is not an impossibility. When the conduct of the individual does not depart from received usages, when it is not controlled by one of those false ideas that make him hate his relations and friends without any motive, and when

he regulates his expenses prudently, we do not think that whimsical actions, or words, the results of an erroneous belief, but having no influence on the prominent acts of his life, should deprive a person of his civil liberties, and of the power of making his will." De Boismont, cited 1 Whart. & Stillé Med. Jur. § 58.

³ 1 Whart. & Stillé, § 59; *supra*, § 135.

⁴ See *Boughton v. Knight*, L. R. 3 P. & D. 64; *American Bible Society v. Frice*, 115 Ill. 623; 121 Ill. 376; 6 Dem. 123.

with marked success. There are recorded instances where wills have been refused probate in the English ecclesiastical courts because the testator during life or in the testamentary act showed a disgusting fondness for brute animals. In one case the testatrix, who was a spinster, kept fourteen dogs of both sexes, who were provided with kennels in her drawing-room; in another, a solitary female befriended a multitude of cats, which were provided with regular meals and furnished with plates and napkins.¹ That affection which sets domestic creatures like these above the human kind can hardly be called a natural one, and yet it is not hard to comprehend how a heart whose natural yearnings find no response may expend itself upon the lower animals. The Arab loves his horse, and prisoners of state have, in their solitude, made pets of rats and vermin. The lowest of the brute creation is capable of touching the human chord as well as gratifying a scientific curiosity. One might have expected, then, to find the whimsical attachment of such females pronounced the sign not so much of insane as of merely eccentric behavior; unless, indeed, the will passed coldly by those whose human claims for sympathy should have had the first place in such a disposition.

On the other hand, there is a remarkable case in which a man's will was sustained, as that of an eccentric, not insane person, which not only disinherited the next of kin in favor of a stranger, but displayed a wholly irreverent contempt for the *post mortem* disposition of the testator's own body, such as might shock the most benighted of heathen savages. He directed his executors to cause some parts of his bowels to be converted into fiddle strings, others sublimated into smelling salts, and the remainder of his body vitrified into lenses for optical purposes; and in a letter attached to the will he said: "The world may think this to be done in a spirit of singularity or whim; but I have a mortal aversion to funeral pomp, and I wish my body to be converted into purposes useful to mankind."² One might have wished this will

¹ Taylor Med. Jur. 658, citing *Yglesias v. Dyke*, Prerog. Court, 1852.

² *Morgan v. Boys*, Taylor Med. Jur. 657; cited 1 Redf. Wills, 82.

refused probate, if only to rebuke the offensive zeal which, sanely or insanely, vaunted in a Christian country so flippant a disposition of person and property. But the letter above quoted showed that conscious defiance of public opinion only to be expected from a rational mind; and as the testator himself was shown to have conducted his affairs in life with great shrewdness and ability, and to have been universally regarded by his associates as a man of sound capacity, the court pronounced him eccentric and not deranged upon the proof, and admitted the will.¹ Yet it would be hard to say why tenderness for the brute creation should be thought a sign of unnatural perversion, and contempt for one's own body (and presumably for all human bodies) should not.

§ 151. **The Same Subject.**—But in the matter of funeral and burial, differences of education and habits of thought may unquestionably produce tastes and customs utterly dissimilar. Thus, shocking as it may seem to most of us to have the corpse deliberately burned instead of buried, there are those who, with deliberate thought and even enthusiasm, embrace the doctrine of cremation. A will which gives such a direction need be no more than eccentric. And in details less repulsive, but sounding rather in extravagant folly, the religious views, the personal experience, the habits, associations, and superstitious surroundings of the testator during his life may throw such light upon his directions as wholly to remove the suspicion of insanity. An English case, reversed on appeal, illustrates this remark. The testator, who was a native of England, but had lived long in the East and professed the Mahometan faith, directed that the residue of his estate, after paying specified legacies, should

¹ *Ib.* Judge Redfield pronounces this "the most remarkable case of mere eccentricity upon record, if it was such," and shows a healthy repugnance to testaments so heartless and irreverent. In his opinion, the court took too charitable a view in regard to the testator's mental capacity, and one which an American jury would not be

likely to adopt. And, considering that the will in question not only made so shocking and cold-blooded a sacrifice of the maker's own person to the cause of science, but appears to have sacrificed the heir with equal heartlessness, we may well agree with him. See *Morse v. Scott*, 4 Dem. 507.

go to the poor of Constantinople, and towards erecting a cenotaph in that city, inscribed with his name, and bearing a light to be kept perpetually burning. It was an absurd and superstitious will, when tested by opinions and habits of thought prevalent in England, for which reason the Prerogative Court condemned it as the offspring of insanity; but on appeal, the Privy Council refused to measure derangement by the standard of English thought and feeling, and the will was admitted to probate.¹

§ 152. **Eccentric Habits may afford Evidence of Insane Delusion.** — Eccentric habits may afford proof of insane delusion, when taken in connection with other facts and circumstances pointing to the same conclusion. Especially is this true where the eccentricity together with the delusion follows mental prostration or develops in some strange, sudden, and unaccountable mode, instead of growing as habits usually do.²

§ 153. **Monomania or Insane Delusion involves Derangement; its Selfish Manifestations.** — When we come to the more serious disorder known as monomania, which throws great doubt upon the sufferer's capacity for affairs, the insane delusion on some particular subject is the symptom most prominent; and yet weakness or derangement affects probably the mind as an entirety. The understanding will be found perverted in regard to a single object, or a limited series of objects. Solitary life, or the oppression of some particular task or problem, upon which the brain has long revolved, is likely to have induced this deranged condition from a morbid one; and hence eccentric habits often precede or accompany the disorder. This derangement, which we call monomania, admits of infinitely fine gradations. Nothing

¹ *Austen v. Graham*, 29 E. L. & Eq. 38. In this case, general derangement, and not monomania, was set up by the contestants of the will. The decedent had lost wife and child, and had no

independent means; so that, by this bounty to the poor of a Turkish city, no natural claims appear to have been seriously impaired.

² *Miller v. White*, 5 Redf. 320, affords a good illustration in point.

leads more naturally to the disorder than the experience of a mind of active but ill-attuned faculties, which has been thrown back upon itself from some cause without the sure prop of external sympathy; and in its most decided manifestations it is selfish, and morbidly rejects the natural companionship. It would appear, too, that the person thus afflicted may retain a sufficient power of will to restrain his expressions of aversion, and conceal the real depth of his delusion.

"It is well known to those who are conversant with the insane," observes Dr. Prichard, "that in persons who are considered as laboring under monomania, the mind is otherwise disordered and weakened, though the characteristic illusion is the most striking phenomenon. The social affections are either obliterated or perverted; some ruling passion seems to have entire possession of the mind, and the hallucination is in harmony with it, and seems to have had its origin in the intense excitement of the predominant feeling; this is always a selfish desire or apprehension, and the illusory ideas relate to the personal state and circumstances of the individual. In most cases of exclusive or partial mental illusion, the persons affected are abstracted, absent, incapable of applying themselves to any occupation, or even of reading with attention; they either forget the objects of their strongest attachment, or if they think of them at all, it is only to accuse them of injustice and cruelty, on the most frivolous pretexts, or the most improbable suspicions."¹

§ 154. **The Same Subject.**— Authorities in the medical jurisprudence of insanity teach us that the illusions or false

¹ Prichard's *Insanity*, cited in Smith *v. Tebbitt*, L. R. 1 P. & D. 422.

See also Dr. Hammond's tract on *Insanity*, quoted in 1 Whart. & Stillé, § 60, note. It is laid down by this eminent physician: (1) That one of the most prominent features of this species of insanity is a morbid feeling of hatred to friends and relatives, and a disposition to do them injury. (2) That it is

especially a symptom of monomania to imbibe delusions which exercise a governing influence over the mind of the affected individual, and force him to the commission of acts which in a state of sanity he would not perpetrate. (3) That the monomaniac has power to conceal his delusions and to arrest the paroxysms of delirium to which he may be subjected.

impressions of the monomaniac have almost always, if not invariably, a reference to himself; that at some times they relate to his fortune, rank, or personal identity; at others, to his health of body and his sensations. "In the former class of cases," says Dr. Prichard, "the patient, feeling himself unhappy, fancies himself in debt, ruined, betrayed; or, being disposed to an opposite state of feelings, possessed of great wealth and affluence, and superior to all mankind. The difference of these impressions seems to depend upon the different state of spirits; the persons affected by the former kind of impressions are those whose minds are predisposed to gloom and forebodings of ill; the latter kind affect the sanguine and excitable."¹ And it is matter of common note that persons so deranged fancy themselves kings, or emperors, prophets, or popes; far in dignity above the common herd of mankind.

§ 155. **English Opinions of Monomania as affecting Testamentary Capacity.** — So much of our knowledge of insanity is built upon imperfect phenomena, that we need not be surprised to find authorities, and eminent ones, laying down somewhat at variance the maxims which ought to apply to cases of insane delusion. The English rule was long considered as settled on the rational basis, that whether a will shall be set aside or not on the ground of monomania, or some particular mental delusion, should be tested by ascertaining whether or not the will appears to have been the direct, unqualified offspring of the morbid or insane delusion. Upon such a distinction turned the decision of Sir John Nicholl in the celebrated case of *Dew v. Clark*,² which was confirmed by the Court of Delegates, and whose judgment Lord-Chancellor Lyndhurst refused to disturb,³ observing, when objections were pressed to the use of the term "partial insanity" in the court below, that the eminent judge meant only to convey that there must be unsoundness of mind in order to

¹ Prichard's "Insanity in Relation to Legal Questions," cited in *Smith v. Tebbitt*, L. R. 1 P. & D. 422.

² *Dew v. Clark*, 1 Add. 279; 3 Add. 79. *Supra*, § 143.

³ See 5 Russ. Ch. 163.

invalidate a will, but that the unsoundness may be evidenced only, or principally, with reference to one or more subjects.¹ The Lord-Chancellor's reservation of this point invited at the next opportunity a vigorous attack upon the theory of "partial insanity" in any such sense as should present the idea of a divisible mind, sound in some functions and unsound in others. The opportunity came in 1848, when in a remarkable case Lord Brougham boldly took ground against the notion that there could be insanity on one point as consistent with testamentary capacity.² This opinion he delivered without dissent as the judgment of himself and jurists like Lord Langdale and Dr. Lushington, whose names commanded the highest respect in legal circles. The judgment rendered might well enough have been reached through the reasoning of Sir John Nicholl; hence we may question whether the support of Lord Brougham's colleagues went beyond repudiating on so fitting an occasion the compartment theory of the human mind, and leaving Lord Brougham, a man more famous for versatile attainments than the judicial temper, to work out his own ingenious speculations in the brilliant essay which legal usage styled an opinion.³

¹ 5 Russ. Ch. 63.

² *Waring v. Waring*, 6 Moore P. C. 349.

³ "The question being," says Lord Brougham, "whether the will was duly made by a person of sound mind or not, our inquiry, of course, is, whether or not the party possessed his faculties, and possessed them in a healthful state. His mental powers may be still subsisting, no disease may have taken them away, and yet they may have been affected with disease, and thus may not have entitled their possessor to the appellation of a person whose mind was sound. Again, the disease affecting them may have been more or less general; it may have extended over a greater or less portion of the understanding, or rather, we ought to say, that it may have affected fewer of the mental faculties." Here follows an

able criticism of theories which obstruct the true conception of the mind as one and indivisible; his Lordship objecting to the expression "partial insanity," or even "monomania," and arguing that when we predicate that one is of unsound mind only upon certain points, we are wrong in supposing such a mind really sound on other subjects; it is sound only in appearance. "It follows, from hence, that no confidence can be placed in the acts, or in any act, of a diseased mind, however apparently rational that act may appear to be, or may in reality be." One uniformly of sound mind could not at the moment of the act be the prey of morbid delusion, whereas the person called partially insane would inevitably show his subjection to the disease the instant the topic was suggested; therefore we can rely upon the

At first it was inferred by many that a new doctrine had been introduced into English jurisprudence, a new constraint placed upon testamentary capacity in doubtful cases ; and the danger was great that eccentric testators would lose whatever precarious foothold they had ever gained in courts of probate jurisdiction. In *Smith v. Tebbitt*, Sir J. P. Wilde, in 1867, made Lord Brougham's hypothesis the starting-point of his own investigation. "A person," he observed, "who is affected by monomania, although sensible and prudent on subjects and occasions other than those upon which his infirmity is commonly displayed, is not in law capable of making a will."¹

§ 156. **The Same Subject.**—But in 1870 the Court of Queen's Bench repudiated expressly the hypothesis of Lord Brougham, and returned to the old ground. Chief-Justice Cockburn, a man of vigorous powers, who always regarded the substantial justice of the cause which his court was called upon to decide, reviewed the whole subject in a masterly manner, and reached this satisfactory result : that delusions, arising from mental disease, which are not calculated to prevent the exercise of those faculties essential to the making of a will, nor to interfere with the consideration of the matter

act of the former, but not upon that of the latter. "It must always be a question of evidence," is Lord Brougham's conclusion, "on the whole facts and circumstances of the case whether or not the morbid delusion existed at the time of the *factum*: that is, whether, had the subject of it been presented, the chord been struck, there would have arisen the insane discord which is absent, to all outward appearance, from the chord not having been struck."

This is certainly a very difficult maxim for any jury of ordinary sagacity to apply. It presents a hypothesis, not a common-sense rule, for their guidance, and must in many instances prevent a just decision. Might not one be under a morbid delusion with reference to the future state, the presence of ghosts and

so on, and yet show himself capable of managing his own worldly affairs and making a rational disposition of his property?

¹ *Smith v. Tebbitt*, L. R. 1 P. & D. 398. "For I conceive," he adds, "the decided cases to have established this proposition: that if disease be once shown to exist in the mind of the testator, it matters not that the disease be discoverable only when the mind is addressed to a certain subject to the exclusion of all others, the testator must be pronounced incapable. Further, that the same result follows, though the particular subjects upon which the disease is manifested have no connection whatever with the testamentary disposition before the court." *Ib.*

which should be weighed on such an occasion, and which delusions have not in point of fact influenced the testamentary disposition in question, are not sufficient to deprive the testator of testamentary capacity and to invalidate his will.¹

Unlike the cases, beginning with *Waring v. Waring*, which had ruled otherwise, this was an instance where it was really just to the testator's memory that the will in controversy should be sustained. The opinion itself, which the Chief-Justice personally prepared, contained cautious reservations indicating that, as concerned the human mind in the unity of its functions, he accorded with the views advanced by Lord Brougham and the best of modern psychologists.²

¹ *Banks v. Goodfellow*, L. R. 5 Q. B. 549. The able and sagacious Chief-Justice admits the great distrust with which any will must be regarded where the testator is once shown to have had insane delusions; especially, if the will itself is an unjust one. "But when in the result," he continues, "the jury are satisfied that the delusion has not affected the general faculties of the mind, and can have had no effect upon the will, we see no sufficient reason why the testator should be held to have lost his right to make a will, or why a will made under such circumstances should not be upheld. Such an inquiry may involve, it is true, considerable difficulty and require much nicety of discrimination, but we see no reason to think that it is beyond the power of judicial investigation and decision, or may not be disposed of by a jury directed or guided by a judge."

² Lord Brougham and Sir J. P. Wilde (*Lord Penzance*) lay it down that the mind, being a unit, cannot be said to be disordered in one part and not in another. The theory of Chief-Justice Cockburn is best stated in his own words: "Whatever may be its essence, every one must be conscious that the faculties and functions of mind are as various and distinct as are the powers and functions of our physical organiza-

tion. The senses, the instincts, the affections, the passions, the moral qualities, the will, perception, thought, reason, imagination, memory, are so many distinct faculties or functions of mind. The pathology of mental disease, and the experience of insanity in its various forms, teach us that while, on the one hand, all the faculties, moral and intellectual, may be involved in one common ruin, as in the case of a raving maniac; in other instances, one or more only of these functions may be disordered, while the rest are left unimpaired and undisturbed; that, while the mind may be overpowered by delusions which utterly demoralize it, and unfit it for the perception of the true nature of surrounding things, or for the discharge of the common obligations of life, there often are delusions which, though the offspring of mental disease, and so far constituting insanity, yet leave the individual in all other respects rational, and capable of transacting the ordinary affairs and fulfilling the duties and obligations incidental to the various relations of life. No doubt when delusions exist which have no foundation in reality, and spring only from a diseased and morbid condition of the mind, to that extent the mind must necessarily be taken to be unsound, just as the body, if any of its parts or functions is

Sir James Hannen, one of the court responsible for the decision in this case, took occasion to commend Lord Cockburn's views somewhat later, when charging a jury as Judge Ordinary where another will was opposed at the probate on the ground of insane delusion.¹ Such, then, is the posture of English judicial opinion on this difficult subject at the present time.

§ 157. **English Cases stated where Wills were refused Probate because of Insane Delusion.**—Passing from dictum to decision, we find, as often happens, no such great discrepancy; principles having been disputed more broadly than the facts of a given case required. To begin with *Dew v. Clark*, decided about 1823. An eminent electrician had an only child, a daughter of amiable traits, and worthy of his affection; and after experimenting most cruelly to bend her to his wishes, and explore those unuttered thoughts which are confided by the human soul to its Maker alone, he displayed against her an uncontrollable disgust and aversion, oppressing her in various ways, and finally making a will which cut her off in favor of his collateral relations. Upon the evidence submitted, John Nicholl found that the testator was insanely deluded upon the subject of his own child, and refused the will probate.²

affected by local disease, may be said to be unsound, though all its other members may be healthy and their powers or functions unimpaired." L. R. 5 Q. B. 549.

Whether we accept its accuracy or not, in the fullest sense, the analogy here suggested between mental and bodily disease is certainly a striking one, making the seen figurative of the unseen.

¹ *Boughton v. Knight*, L. R. 3 P. & D. 64. Sir James Hannen's exposition, which is highly interesting, has the advantage of being the latest one of consequence pronounced in England upon insane delusions as affecting the issue of testamentary capacity. But in *Smee*

v. Smee, 5 P. D. 84 (1879), the Court charged a jury to the same effect as in *Banks v. Goodfellow*, *supra*.

² *Dew v. Clark*, 3 Add. 79; 1 ib. 279; 2 ib. 102.

In the opinion here rendered, reference is made to the authority of *Greenwood's Case*, which, as it seems, was never fully reported, though stated somewhat in detail in various books. Mr. Greenwood, while insane, took up an idea that his brother had administered poison to him, and this became the prominent feature of his malady. He recovered from his insanity and returned to his profession, which was that of a barrister, but never could shake off the morbid delusion that his

In *Waring v. Waring*, a case whose decision required no different mental hypothesis such as Lord Brougham saw fit to promulgate, the testatrix, a woman advanced in years, was very penurious, irritable, wrangled to an excess with her servants, and at times indulged in grossly obscene conversation, imagining herself to be amorously sought by the chief ministers of the realm. All this perhaps might have passed for eccentricity; but it was shown, besides, that she had an insane delusion that her brother had joined the Catholics, whose religion she abhorred, and like her distinguished lovers prowled about her house in strange disguise; and that brother she disinherited. Coupled as all this was with an inquisition of lunacy, it was easy to pronounce against her will, upon any theory of insane delusion.¹

Once more, in *Smith v. Tebbitt*, the will of a testatrix was set aside whose religious delusions were astounding. Her deceased husband was the "devil," for whom she would not go into mourning; her heirs-at-law were "doomed to perdition"; she had a tiara of jewels made in which she was to ascend to heaven; she believed herself "the Holy Ghost," and her medical adviser "the Father"; and to the latter, a stranger in blood who had rendered her no unusual service, after providing sundry legacies for relatives, servants, and others, she willed the great bulk of her fortune as the gift of "one member of the Trinity" to another.²

§ 158. **The Same Subject.**—Very different in its presentation of facts and circumstances was *Banks v. Goodfellow*, where the Chief-Justice and Queen's Bench refused to sanction a positive injustice upon any plea of theoretical consistency. In the former instances there was an inofficious will to be set aside, here there was none. Before, the partial

brother had tried to poison him, and in his will he disinherited the brother. The issue of *devisavit vel non* was tried in two different courts, one verdict being against the will, the other sustaining it; but the suit ended in a compromise. See 3 Add. 96, 97; 13 Ves.

89; 3 Curt. Appx. 1-31; 1 Wms. Exrs. 29, note.

¹ *Waring v. Waring*, 6 Moore P. C. 349.

² *Smith v. Tebbitt*, L. R. 1 P. & D. 398.

unsoundness of mind, or rather the monomania, operated upon the particular disposition injuriously to the natural objects of the deluded person's bounty; now it did not. Two delusions disturbed the mind of the testator: one, that he was pursued by spirits; the other, that a man, long since dead, came personally to molest him, this dead man a person not in any way connected with the natural objects of the testator's bounty. The will in dispute might well have been the product of a capable mind; and, admitting that the testator was sometimes incapable, the issue of actual capacity at the time of the act had been left to the jury under instructions sufficiently guarded. The jury found for the will, which was one in favor of the testator's niece; and as the will was not unnatural, nor the testator's delusions such as could have influenced the disposal of his property, the court on appeal refused to disturb the verdict.¹

Once more, in *Boughton v. Knight*,² the testator's will was set aside because of an insane delusion which operated injuriously against his own flesh and blood. In this case Sir James Hannen stated, with great positiveness of expression, that there is a limit to sustaining wills whose provisions are unjust and unnatural. A man moved by capricious, mean, or even bad motives may at our law wholly or partially disinherit his own children and leave his property to strangers; but there is a point beyond which it will cease to be a question of harsh and unreasonable judgment, and then the repulsion which a parent exhibits to his child must be held to proceed from some mental defect; and if such a repulsion, amounting to a delusion, is shown to have existed prior to the execution of the will, the party who propounds that will must show that it was inoperative when the will was made.³

§ 159. **American Maxims as to the Effect of Monomania upon Testamentary Capacity.**—In the American cases, where the influence of monomania or insane delusion appears to

¹ *Banks v. Goodfellow*, L. R. 5 Q. B. 549.

² L. R. 3 P. & D. 64.

³ *Boughton v. Knight*, L. R. 3 P. & D. 64; and see *Smee v. Smee*, 5 P. D. 84.

have afforded a wider scope for investigation, the doctrine of testamentary capacity as understood in England prior to 1848, and once more favored in 1876 by the court of Queen's Bench,¹ is firmly adhered to. The notion to which Lord Brougham gave currency, that a single delusion lurking in the testator's mind vitiates his will (though not apparent in the will itself) because it proves him insane, is pointedly condemned by eminent judges in various States;² and the point of inquiry upon which testamentary cases of this character invariably turn is, whether the insane delusion, the monomania, entered into the product of the particular will in dispute. In other words, where general insanity so as to wholly incapacitate is not apparent, but simply monomania, the court will admit the will to probate where, upon the whole proof, the conclusion reached is that the provisions of the will were not influenced by the insane delusion;³ but where, on the contrary, it should fairly be inferred that the instrument was affected by the insane delusion, probate will be refused.⁴ Not an American case of consequence has departed from this standard;⁵ and, as a general rule, any unsoundness of mind which appears not to affect the general faculties, nor to operate on the mind of a testator in regard to his testamentary disposition, is not deemed sufficient to render him incapable

¹ *Supra*, § 156.

² See *Dunham's Appeal*, 27 Conn. 192, 204.

³ *Boardman v. Woodman*, 47 N. H. 120; *Whitney v. Twombly*, 136 Mass. 145; *Clapp v. Fullerton*, 34 N. Y. 190; *Hollinger v. Syms*, 37 N. J. Eq. 221; *Blakely's Will*, 48 Wis. 294; *Stackhouse v. Horton*, 2 McCart. 202; *Leech v. Leech*, 11 Penn. L. J. 179; *James v. Langdon*, 7 B. Mon. 193; *Gass v. Gass*, 3 Humph. 278; *Cole's Will*, 49 Wis. 179; *Rice v. Rice*, 50 Mich. 448; *Thompson v. Quimby*, 2 Bradf. 449; s. c. as *Thompson v. Thompson*, 21 Barb. 107; *Turner v. Hand*, 3 Wall. Jr. 120; *Brown v. Ward*, 53 Md. 376.

⁴ *Boyd v. Eby*, 8 Watts, 70; *Johnson v. Moore*, 1 Litt. 371; *Seaman's Friend*

Society v. Hopper, 33 N. Y. 619; 43 Barb. 625; *Lucas v. Parsons*, 24 Ga. 640; *Florey v. Florey*, 24 Ala. 241; *Stanton v. Wetherwax*, 16 Barb. 259; *Merrill v. Rolston*, 5 Redf. 220; *Tawney v. Long*, 76 Penn. St. 106; *Gardner v. Lamback*, 47 Ga. 133; *American Bible Society v. Price*, 115 Ill. 623; *Chaney v. Bryan*, 16 Lea, 63; 45 N. J. Eq. 726; *Vedder &c*, 6 Dem. 92.

⁵ See *Cotton v. Ulmer*, 45 Ala. 378, where the Supreme Court condemns a somewhat involved charge to the jury, by way of hypothesis, in effect that a will may be upheld, although the direct offspring of a particular insane delusion, if the jury believe the testator would have made the same will if he had been sane.

of disposing of his property by will.¹ On the other hand, partial insanity or monomania is frequently held in this country to invalidate a will which is the direct offspring thereof, though the testator's general capacity be unimpeached.²

§ 160. **American Cases stated where the Will of a Monomaniac was sustained.**—There are numerous American instances where the will of one affected by monomania has been sustained notwithstanding some insane delusion or delusions collateral to the disposition. As in the case of a testator, who entertained the most extraordinary, senseless, and absurd opinions on matters quite disconnected from the disposition of his property.³ Or of one who perversely insisted that his former wife, from whom he was divorced, had been unchaste; and that their child was illegitimate,

¹ *Pidcock v. Potter*, 68 Penn. St. 342.

In *Boardman v. Woodman*, 47 N. H. 120, it was decided that, although the testator may have been under a delusion on one or more subjects, yet if the will made by him, and its provisions, were not in any way the offspring or result of the delusion, and were not connected with or influenced by it, then the testator may be regarded, as in law, of sane mind, for the purpose of making the will, and the will as valid. This, says Sargent, J., "is in accordance with the great weight of authority, ancient and modern, English and American, medical and legal." And he disapproves the opinion of Lord Brougham's in *Waring v. Waring* (§ 158) to the contrary. The opinion in *State v. Jones*, 50 N. H. 396, is to the same effect, and Chief-Justice Cockburn and the doctrine of *Banks v. Goodfellow* are commended.

So in a Connecticut case in 1850, the court reviewed the authorities carefully, including *Waring v. Waring*, and ruled that "the notion that a single delusion is general insanity, and that the jury are to be so instructed, irrespective of the degree or intensity of it, is nowhere countenanced in this country, and not

until lately in England." Here the court below had refused to instruct the jury "that, if the testatrix harbored a delusion, she was, while harboring such delusion, of unsound mind, and her will made at such a time would be void." Ellsworth, J., who delivered the opinion on appeal, held that this refusal to so instruct the jury was right. His conclusion of the law is: "That, if the testatrix had mind enough to know and appreciate her relations to the natural objects of her bounty, and the character and effect of the dispositions of her will, then she had a sound and disposing mind and memory, although her mind may not be entirely unimpaired." *Dunham's Appeal*, 27 Conn. 192. See also the criticism of Lord Brougham in *Ben-oist v. Murrin*, 58 Mo. 307.

² See the patient and exhaustive analysis of this subject, with citations from reports, English and American, by Surrogate Redfield, in *Merrill v. Rolston*, 5 Redf. 220.

³ *Thompson v. Thompson*, 21 Barb. 107, sustaining the decree in 2 Bradf. 449. Mistaken beliefs or delusions not insane will be considered presently.

there being no proof that the delusion affected his parental conduct in the slightest degree, or that his will discriminated unjustly against the child, considering that the latter inherited from the divorced wife besides, who had received a very liberal alimony at the testator's cost.¹ Or of one whose mental delusion relates merely to his physical condition and the cause of his infirmity.² Or even of one deluded, indeed, as to some particular person who might otherwise have expected a legacy under the will, but who cannot possibly derive any legal benefit from having the will set aside.³ Or generally where it is manifest that one's delusion has not affected his gifts.⁴

§ 161. **American Cases stated where the Will of a Monomaniac was not sustained.** — On the other hand are numerous decisions, where the will of a monomaniac was refused probate; the insane delusion so tainting the testamentary disposition that it could not justly be permitted to operate. As in a case where a father, while attacked with a mental disorder, conceived a strong dislike to his eldest son, without any adequate cause, and, recovering his reason in all respects except this perversion of natural affection, made a will which disinherited the son.⁵ Or where, again, the testator was under a delusion that his nephews, being his heirs-at-law, were conspiring to take his life, and that one of them had caused his death by putting him in a stove.⁶ Or where the decedent, a woman, became insanely morbid over the marriage made by her heir with her disapproval, and pursued him

¹ Cole's Will, 49 Wis. 179.

² Hollinger v. Syms, 37 N. J. Eq. 221.

³ Stackhouse v. Horton, 2 McCart. 202.

⁴ Rice v. Rice, 50 Mich. 448. And see Benoist v. Murrin, 58 Mo. 307; Denson v. Beazley, 34 Tex. 191; Lee v. Scudder, 31 N. J. Eq. 633; 35 N. Y. 70; Vedder R., 6 Dem. 92; Schneider v. Manning, 121 Ill. 376; 125 Ill. 33; Smith v. James, 72 Iowa, 515. The illusion of one in the last stage of consumption that she will recover is of

little consequence in such connection. Ayres v. Ayres, 43 N. J. Eq. 565.

⁵ Lucas v. Parsons, 24 Ga. 640. It will be seen that the facts in this case very strongly resemble those in Greenwood's Case, cited *supra*, § 157. A perversion of feeling like this is not seldom the last trace left of mental disorder where the convalescent appears in other respects restored to reason.

⁶ Seaman's Friend Society v. Hopper, 33 N. Y. 619; S. C. 43 Barb. 625.

with the jealousy, vindictiveness, and vulgarity of a monomaniac to the day of her death, giving the bulk of her property to charities by her will.¹ Or where an intemperate husband was shown to be so insanely jealous of his wife, a chaste woman, that he denied the paternity of his own children, beat and abused her on account of her supposed infidelity, and finally shot her dead and committed suicide, leaving a written statement behind which imputed dishonor to her absurdly and falsely.²

Insane delusion may relate to the property of which one disposes, rather than to the persons who are the natural objects of his bounty.³ In short, monomania, or partial insanity, will invalidate any testament which may fairly be inferred to be the direct offspring of the malady, and an instrument vitally different from what it would have been had the mind been in its normal sane condition.⁴ While the discarding of one's relatives, and distant ones more especially, affords no necessary inference of incapacity, and while mere prejudice against the natural objects of one's bounty, should not vitiate a testator's will, the case is different where the testamentary disposition appears to have been colored or distorted by some morbid and false delusion.⁵

Eccentric habits and insane delusion are often suddenly manifested together. In a New York case, an aunt, in 1877, made a will in favor of her niece and only next of kin. She was then tidy, ladylike, and hospitable; but in 1878 she became slovenly, morose, and unsociable, and, without any good reason, took a dislike to her niece, aspersed her motives in visiting her, and even falsely charged her with pilfering. When she died, it was found that she had revoked by a codicil all the provisions made in her niece's favor; and this codicil the court set aside as evidently the offspring of an insane delusion.⁶

¹ *Merrill v. Rolston*, 5 Redf. 220.
And see *American Bible Society v.*
Price, 115 Ill. 623; *Dorman Re*, 5
Dem. 112.

² *Burkhart v. Gladish*, 123 Ind. 338.

³ *Brinton's Estate*, 13 Phila. 234.

⁴ *Drinkhouse's Estate*, 14 Phila. 291;
Whitney v. Twombly, 136 Mass. 145;
Tittel's Estate, Myrick, 12.

⁵ See *Chaney v. Bryan*, 16 Lea, 63;
Lockwood's Will (N.Y.) Am. Dig. 1890.

⁶ *Miller v. White*, 5 Redf. 320.

§ 162. **Insane Delusion to be distinguished from Prejudice or Error, as well as Eccentricity.** — Insane delusion should be distinguished from prejudice or some rational belief not well founded, however perversely the testator may have clung to it. By delusion in the popular sense of the word, even a sane mind may be possessed ; and this fact legal if not medical jurisprudence recognizes when it bases the present incapacity upon what is termed not delusion, but insane delusion. Be this as it may, experience certainly teaches us that one who is sensible and reasonable on most subjects, who displays in affairs the greatest sagacity and may be implicitly trusted in the details of business management and the disposition of a large estate, and upon whose mental competency it would be preposterous to cast a doubt, will nevertheless display the most narrow and intolerant views on particular questions or with regard to certain individuals. His antipathies in this respect are really as groundless and wrong as they are violent and yet he will be found to cherish them with as much loyalty as he does his sympathies. We may say that his prejudice is the conclusion of a reasoning mind on insufficient evidence. Yet the mind refuses proof or arguments to the contrary in many such instances, and remains wedded to its own convictions, its instinctive likes and dislikes. Now, all this obstinate perversity, this wrong-headedness, falls far short of denying one the right to dispose by testament of his own property ; and so would it be though the testator were capricious, revengeful, passionate, niggardly, base, dishonorable, a scoundrel to the world, or even to his own family. For strong, violent, and unjust prejudices, it is held, if not founded in insane delusion, do not establish mental incapacity ; and no will can be set aside on account of any moral obliquity or prejudice of the testator displayed therein, nor because the particular disposition of property is unnatural or unjust, unless this perversion of the affections can be traced to mental disorder.¹

¹ Boardman v. Woodman, 47 N. H. 726; *supra*, § 146; White's Will, 121 120; Trumbull v. Gibbons, 2 Zab. 117; N. Y. 406; 6 Dem. 123. Middleditch v. Williams, 45 N. J. Eq. Some personal grievance operating

As for merely eccentric conduct, we have already seen that this, too, is something distinct from insane delusion, though divided often by a line exceedingly difficult to trace.¹

§ 163. **The Same Subject.** — Capacity, therefore, should not be considered as destroyed by any delusion or ill-founded belief not actually insane.² And where one indulges in a prejudice, however harsh, which is the conclusion of a reasoning mind, on evidence no matter how slight, his will cannot on that account be overturned. Thus, where a sane testator, on slight but insufficient proof clung to the belief that his wife had been unchaste and one of his daughters was illegitimate, and disinherited the latter in consequence, it was decided that the court had no ground for refusing probate of the will.³ So, too, it is held that a testator's mere opinion that some of his children had treated him badly, though erroneously formed, will not invalidate his testament.⁴ The existence of dislikes, prejudices, and animosities, however unfounded, in one's mind does not of itself destroy testamentary capacity, nor justify a court in avoiding an instrument which

upon a strong, irritable, and obstinate temper produces often the state of mind under which the perverse prejudice is formed; and one who in some way happened to be associated with the grievance, like an officer who serves process for others, or the attorney of the offending client, may suffer from the harsh opinion thus conceived. Mr. Justice Grier once charged a jury in the case of a will produced by a testator of this description. "His mind," says the court, "was greatly excited on a particular subject, — his park property. He was very stingy, and set a high value on his rights of property. But it is no evidence of any mental delusion, that he thought this seizure of his property without his consent a high-handed exercise of power, etc. That it became his hobby, made him very troublesome and a bore to all his acquaintances and friends, is of no importance at all, in the matter trying before you, if he retained his memory and his usual shrewdness in the manage-

ment of all his other concerns. Many a man has some hobby, and may ride it very much to the annoyance of others, and yet be perfectly capable of managing his own affairs, and disposing of his property by deed or will." *Turner v. Hand*, 3 Wall. Jr. 120.

¹ *Supra*, § 149.

² *Fulleck v. Allinson*, 3 Hagg. 527; *Hall v. Unger*, 2 Abb. U. S. 507; *Hall v. Hall*, 38 Ala. 131.

³ *Clapp v. Fullerton*, 34 N. Y. 190; *Cole's Will*, 49 Wis. 179. In *Florey v. Florey*, 24 Ala. 241, the circumstances were similar; but as others took advantage of this false impression to deceive the testator, the will was set aside as the offspring of deception. Judge Redfield observes that, in this case, the court evidently confounded mere defect of knowledge and error in judgment with insane delusion. 1 Redf. Wills, 86, note.

⁴ *Short v. Brubaker*, 94 Md. 165; *Hite v. Sims*, ib. 333.

is unaffected by the fraud or undue control of other persons.¹ Even the dislike of a spouse with whom the testator's relations have not been harmonious may be injuriously demonstrated in a will without imputing insanity of any kind to the testator.² Nor does proof of eccentricity, caprice, fretfulness, and a suspicious and irritable temper establish either a lack of mental capacity or insane delusions incompatible with the power to dispose at discretion.³

§ 164. **Aversion not amounting to Insane Delusion illustrated.**—In a recent New York case the will of a married woman was contested on the ground that she had delusions with reference to her husband and some of her children, which created a wrong impression upon her mind and induced her to discriminate against them in the disposition of her estate. It appeared by the testimony that until about fifty-eight years of age the testatrix was a person of intelligence, considerable business capacity, and entirely competent to make a legal disposition of her property. At that period of life she had an attack resembling apoplexy or paralysis; but after recovering from her sickness she continued to manage her business, executed deeds, conversed intelligently with her friends, and gave to her attorney intelligent instructions concerning her will, modifying her views in some respects upon his advice. Though impaired somewhat in health, and perhaps in mental vigor, she collected rents, directed improvements on her property, and virtually conducted her own affairs still as one entirely capable of doing so. Her will was made about a year before her death, and the fortune of which it disposed was derived originally from her husband in settlement of a suit she once brought against him for divorce. As for the dispositions complained of, they appeared more the results of a jealous temper with reference to her husband and resentment cherished towards children who had taken part against her in bitter family quarrels stretching out for a long space of years, than the offspring of any insane delusion on her part; hence the will was admitted to probate.⁴

¹ *Carter v. Dixon*, 69 Ga. 82.

³ *Blakely's Will Re*, 48 Wis. 294.

² *Phillips v. Chater*, 1 Demarest, 533.

⁴ *Coit v. Patchen*, 77 N. Y. 533

§ 165. **Rational or Irrational, Just or Unjust, Character of the Will to be considered.** — The distinction we have just dwelt upon, as between sane and insane delusion, that fallacy which is a pure figment of the disordered brain and that fallacy which comes rather from a prejudice nurtured by some course of deception or self-deception, some eccentricity of character or habits, such as makes one after a time obstinate or inveterate in his groundless belief or aversion, and unjustly disposed in consequence, though by no means an incapable person, is, after all, of less practical consequence in testamentary causes than would appear at first sight. For be the delusion sane or insane, be the habits of the testator purely eccentric or such as indicate a monomania, the best English and the universal American doctrine treats all this lightly in respect of capacity, provided the delusion or the eccentricity has not operated upon the will, distorting its provisions into something unnatural and unjust. But if, on the contrary, the result is to disinherit, to cut off the natural objects of one's bounty, to produce an absurd, hurtful, irrational will, a court or a jury will set such an instrument aside with little compunction, wherever a doubt remains whether the testator was not fixed in his fallacy by others, so as to have been unduly influenced, or else through his own morbid reflection and experience, his peculiar habits and mode of life, perverted in mind until the delusion became an

(1869). This case shows how difficult a task the courts would enter upon, should they undertake to test the rational character of a will, or of the testator's own mind, by the right or wrong involved in domestic feuds which have left their impression upon the instrument. This family had been in constant strife and turmoil, partly because the decedent was passionate, wilful, and jealous of her husband; at one time engaging in a lawsuit, which was compromised by a conveyance to her. Her son once assaulted her with a pistol, and, on being indicted with her husband, was convicted. There was a proceeding

once instigated to put her in a lunatic asylum, which her husband arrested, and of which she herself gained knowledge. In short, those of her children who had taken her side she favored in her will; and those who had not, she discriminated against. It was not easy to say whether she discriminated justly or not; but there was certainly nothing in all this to establish insane delusion.

See *White's Will*, 121 N. Y. 406, to the effect that dislike of Free-Masonry, and of a son, because he belongs to a Masonic lodge, cannot be treated as an insane delusion.

insane one, a monomania, and in this particular respect at least he was unsound, deranged.

This is not, perhaps, what the courts regularly assert ; but an examination of the decided cases under our present head, will show that it is usually the practical consequence. No class of testaments, indeed, where testamentary capacity can be called in question, will be found more easily indulged than those where nothing worse than some harmless delusion can be set up against the testator ; but none are more likely to be set aside, when perverted in terms from justice and natural affection, or as the Roman law styled them, inofficious, than those where the delusion, if such it may be called, must have directly induced the baneful disposition. True, a sane mind must be permitted to work out its own harsh, cruel, and revengeful purposes for *post mortem* effect ; and yet, in determining whether there was entire sanity or monomania, whether the mind, even if sane, had not been brought by some other influence, unfairly exerted, to operate as it did, regard may be had to the contents of the particular will and the circumstances surrounding its execution.¹

§ 166. **Leading Principles applied to Religious Opinions ; Delusions upon Matters Supernatural, etc.** — The leading principles already stated apply to testamentary causes where the opinion, or rather the delusion, of a testator upon religion and matters supernatural furnishes the ground of controversy.

¹ In *Boughton v. Knight*, L. R. 3 P. & D. 64, Sir James Hannen, when setting aside a will which disinherited one's child without any just cause, thus laid down the distinction essentially as above. A man moved by capricious means, or even bad motives, may disinherit wholly or partially his children, and leave his property to strangers. He may take an unduly harsh view of the character and conduct of his children. But there is a limit beyond which it will cease to be a question of harsh and unreasonable judgment, and then the repulsion which a parent exhibits to his child must be held to proceed from some

mental defect. If such repulsion amounting to a delusion as to character is shown to have existed previous to the execution of the will, it will be for the party setting up that document to establish that it was inoperative when the will was made. See also *Cockburn, C. J.*, in *Banks v. Goodfellow*, L. R. 5 Q. B. 549, that the presumption against a will made under the direct influence of a delusion "becomes additionally strong where the will is, to use the term of the civilians, an inofficious one, that is to say, one in which natural affection and the claims of near relationship have been disregarded."

Unquestionably the speculative belief any individual may entertain concerning the present or the future state, things natural or supernatural, religion, politics, education, or any other of those agitating problems upon which men think and divide in sentiment, should properly be considered an affair of his own conscience; and it is within very narrow limits that any such belief can be confidently pronounced a delusion. And so long as one's course of conduct in pursuance of his opinions does not transcend the laws which public policy sees fit to prescribe for society, there is no reason why he should not by testament, as well as by a gift while living, promote with his own fortune the views to which he has attached himself. Upon such considerations wills are justly made which, without neglecting the claims of natural affection, endow churches, seminaries, and societies for the propagation of truth in accordance with the testator's own creed.

But to all this there is a legal limit. Certain so-called truths must necessarily be obnoxious to public policy; errors, in fact, and pernicious to society in its existing stage, according to the standard by which its safety and welfare must be judged. Opinions are held by individuals conscientiously and firmly — as, for instance, in favor of free love, community in property, subversion of civil authority, pure atheism — which courts, though disposed to leave speculation free, may well refrain from sanctioning, when it comes to an individual bequest to propagate. Moreover, upon some such subjects, religion and the supernatural world in particular, men may safely be called deluded; and more than this, insanely deluded, monomaniacs, or even general maniacs. Especially must insanity be the symptom, where the enthusiast or fanatic, as often may happen, comes to imagining himself vested with the divine or supernatural functions: as Prophet, King, or indeed, the Deity in person.¹ Such extreme derangement, if not general, amounts at least to monomania; we say of such a person that he is crazy on religious subjects, though he may show himself otherwise capable and reasonable in affairs.

¹ See *e.g.* *Smith v. Tebbitt*, L. R. 1 P. & D. 398.

§ 167. **The Same Subject.**— If, then, the insane delusion exists without other appearance of incapacity, but, on the contrary, testamentary capacity is apparent in all other respects, the essential question is whether the insane delusion, the monomania, has affected the will and the particular disposition: If it has not, but the will appears just and natural in its provisions and duly executed, there is no reason why the will should be refused probate. But if, on the contrary, the insane delusion has evidently affected the provisions of the will, so as to bestow harshly and unjustly, — sacrificing, in fact, those with natural claims upon the testator's bounty in order to effect some absurd or unnatural purpose, — the will ought to be set aside. And we may add, as the better inclination of the decisions, that wherever the delusion has evidently thus operated to pervert the provisions of the will in this manner, there is no need of very minute inquiry as to whether the delusion was sane or insane; for the instrument itself affords strong proof that the faculties of the mind were too disordered to bear properly upon the scheme of testamentary disposal.¹ For the will which delusion does not invalidate is, after all, a rational one.

§ 168. **Wills of Persons believing in Witchcraft, Spiritualism, Clairvoyance, etc.** — It follows that the will of one who believes in witchcraft, magic, ghosts, and spectral influences, whether supernatural or only mysterious, is not on that sole account void.² Nor does the belief in spiritualism invalidate a will as a matter of law;³ nor the belief in clairvoyance, mesmerism, faith-cures, or other matters upon which the majority of society are skeptical.⁴ To make evidence of such belief admissible to show mental incapacity it must first appear that the will was the offspring of such belief. Even were one

¹ *Supra*, § 147.

² *Addington v. Wilson*, 5 Ind. 137; *Kelly v. Miller*, 39 Miss. 19; *Thompson v. Thompson*, 21 Barb. 107; 2 Bradf. 449; *Leech v. Leech*, 4 Am. L. J. 179; *Vedder Re*, 6 Dem. 92.

³ *Brown v. Ward*, 53 Md. 376; *Otto v. Doty*, 61 Iowa, 23; *Robinson v.*

Adams, 62 Me. 369; *Smith's Will*, 52 Wis. 543; *Keeler's Will* (N. Y.) Am. Dig. 1889; *Middleditch v. Williams*, 45 N. J. Eq. 726. But *cf.* *Lyon v. Home*, L. R. 6 Eq. 655; 1 Redf. Wills, 163.

⁴ *La Bau v. Vanderbilt*, 3 Redf. 384.

thought insane instead of credulous on such subjects, he might still be unimpaired in general testamentary capacity. But where such a belief affects directly the provisions of the will, perverts them from their just and natural course, and gives an irrational tincture, so to speak, to the whole instrument, a serious issue is presented at the probate. It is a peculiarity of spiritualism, that the believer considers himself guided in his conduct by invisible agencies; for which reason one recent case, at least, under this head seems to regard undue influence rather than insane delusion and incapacity as the ground upon which such wills should be assailed.¹ But this refines too greatly the scope of controversy in such cases; for we should still treat these spiritual whisperings, like dreams or visions, as the testator's own delusion, and consider him a capable or incapable testator, especially when the offspring of such invisible converse partakes more nearly of the diabolical than divine nature. If he made his will at the dictation of a clairvoyant or other adviser palpable in the flesh, that of course is another matter.² As to beings invisible and intangible, however, one's speculative belief in their existence need not affect his testamentary capacity at all; but if one is possessed by spirits or the devil, when his will is made, it is enough that the will is found the product of a deluded or deranged mind, to justify setting it aside when inofficious, without attempting to resolve what views of disposition the spirits or the devil pressed upon the testator or how hard they pressed them.³

¹ Robinson v. Adams, 62 Me. 369.

² Cf. Thompson v. Hawks, 14 Fed. Rep. 902; Greenwood v. Cline, 7 Or. 17.

³ In Smith's Will, 52 Wis. 543, the testator was one whom many regarded as crazy, and who was certainly quite eccentric. He believed in spiritualism, married a second time, and claimed that the spirit of his first wife approved his choice, as well as the will which he afterwards made in favor of the second wife, to the exclusion of the first wife's children. The court sustained the will;

resting, however, with much confidence upon the peculiar circumstances which proved the will by no means an unjust one. The testator had lived happily with his second wife; and it was not through her fault alone that she and the children by the former marriage did not get on well together. These children were all adults, and able to provide for themselves; while the whole property, after settling up the estate, would not be more than enough for the widow's comfortable support.

Upon the matter of spiritual influ-

ences, the spirit of the first wife did not guide the testator, according to his assertions which were submitted in proof, but only declared an approval of the will after he had made it. And while the testator had often professed to be guided in his worldly affairs by various spirits, it appeared that a positive faith in the accuracy of his own judgment served as an important counterpoise to the delusions he might have entertained. He had himself once declared, after some ill experience with advice of that kind, that there appeared to be some spirits which tried to fool him, and others which did not.

CHAPTER IX.

PROOF OF CAPACITY AND INCAPACITY.

§ 169. **In Uncontested Cases of Probate, much is taken for granted by the Court.** — Wherever a will is presented for probate and no contestant appears, most of the facts essential for establishing the instrument are readily taken for granted. In England there is a simple mode of procedure for non-contested cases, known as the probate in common form; and though scarcely an American State appears to have expressly adopted that mode, yet we not uncommonly find the proof of the will reduced to a minimum under such circumstances.¹ Capacity in the testator is inferred readily from his due execution of the instrument; and as for the fact of his death, of his last place of residence, the question who are his kindred, or his heirs-at-law, the identity of the executor named, and the like, all these matters are *prima facie* inferred by the court from unsworn² recitals of the petition for probate, with little or no formal examination. Since the probate tribunals of original jurisdiction are, under our political system, county or local tribunals, the main facts of this character are often a matter of public notoriety; but it is not upon this consideration alone that the judge passes the instrument to probate upon so brief a scrutiny. He relies considerably upon the citation of interested parties, which issued before the petition for probate could come up for a hearing; and the interested parties not having appeared or making no opposition, he readily presumes, upon slight proof of execution, not only that the will is what it purports to be, but that the great facts essential to the validity and operation of the instrument concur in making the probate effectual. A certain sobriety and decorum is preserved in these judicial proceedings, as at the funeral; as though some painful but necessary solemnity over

¹ Schoul. Exrs. § 65.

² Sworn, as some late codes require.

the deceased must be carried out without probing officiously the feelings and disposition of the surviving family, but rather anticipating their presumed wishes.

§ 170. **In Contested Cases, the Burden of Proof is upon the Propounder of the Will.** — But whenever a contest arises over the will, — a situation of affairs unlikely to occur before the bereaved family, heirs, kindred, and interested parties have had private warning, that some of their own number are too profoundly dissatisfied not to break through this atmosphere of decorum, and expose to scandal the home relations of the decedent, — it becomes a preliminary inquiry upon which of the litigating parties rests the burden of proof. There is, more however in appearance than reality, a variance of opinion expressed in the reports on this point. The true rule we conceive to be this: that wherever the capacity or incapacity of the testator is called in question, whether because of infancy or insanity, or on any other of the grounds we have already considered, and so, too, if the testator's death, residence within the jurisdiction, or any other fact essential to establishing a probate of the instrument is disputed, the formal burden of proof is upon the executor, or those who set up the particular will in controversy. And this rule holds good in whatever form the trial should properly be conducted, whether in original forum of probate, or upon appeal, so long as the issue is directly taken upon the probate of that identical will.¹

This, as Judge Redfield has observed, is in analogy to proceedings upon other instruments or contracts,² which are contested either upon the ground of want of execution; or want of capacity in the person contracting, or of fraud in

¹ 1 Greenl. Evid. § 77; 1 Redf. Wills, 31, and cases cited; and see cases *infra*.

² But we should note that probate, as understood at the present day, is a formality to which other instruments or contracts are not subjected by any analogy, being a unique sort of procedure appropriate to wills. "Sanity,"

says Baron Parke, "is the great fact which the witness to the will has to speak to when he comes to prove the attestation; and this is the true reason why a will can never be proved as an exhibit, *viva voce*, in chancery, though a deed may be; for there must be liberty to cross-examine as to sanity." *Barry v. Butlin*, 1 Curt. 637.

procuring the contract. In all of which cases the formal burden of proof being upon the party setting up the instrument, he is allowed to go forward in the proof and in the argument.¹

§ 171. **The Rule of Burden of Proof sometimes laid down otherwise as to Mental Capacity.**— There are, nevertheless, numerous cases in which the rule as to burden of proof appears to have been laid down by eminent judges to the contrary. These cases have direct reference to issues of mental soundness and unsoundness; and to this subject our present inquiry will be chiefly directed. The confusion in the legal mind on this subject comes perhaps from expatiating beyond the facts which the particular case presented for decision. Often, where it might hastily be inferred that the burden of proof was placed originally upon contestants of the will instead of the proponent, the court had in reality presumed capacity from a slight presentment of facts by such proponent, and treated the burden as actually so shifted in consequence, that the contestant would be put necessarily to the proof of establishing incapacity against this presentment. And, again, as mental derangement may be followed by mental soundness, or *vice versa*, and the disorder itself is subject to lucid intervals, it is obvious that the burden of proof must in such cases be lightly adjusted, and slide almost imperceptibly from one litigant to the other. Surely one who offers the will for probate cannot be expected to go far with testimony to prove a negative.

It is only in this delicate investigation of mental condition, and, moreover, of free volition in the testator (of which latter subject we shall treat in the next chapter²) that judicial variance may be expected. Rarely do such other essential facts as death, last place of residence, or full age, elicit discussion of this kind at all; and if ever they did, the point at issue being so comparatively simple, we should see more clearly that it is the proponent, not the contestant of the

¹ 1 Redf. Wills, 31; also cases *infra*, where sanity is the issue.

² See next c. as to undue influence, etc.

will, who moves in advance, and carries the general burden of proving whatever may be requisite to establishing the particular instrument in a court of probate as the last will and testament of the deceased.

§ 172. **Burden of proving Capacity; Presumption in favor of Sanity; Confusion of Rules.**—The issue of great consequence being then whether or not the testator was of sound mind when the will was executed, two principles are laid down which seem to conflict. The first, as already stated, is that upon the proponent rests the general burden of establishing capacity, or, in other words, sanity. The second is, that a presumption arises that every adult is *compos mentis*, and consequently that the party who alleges insanity has the burden of proving that unnatural condition. In this apparent contradiction originates our present confusion; and from the abundant *dicta* to be found in the reports, one might argue, as an abstract proposition, that the burden was on the one party or the other, as best suited his purpose.

§ 173. **English Authorities on this Subject.**—In England it is laid down that if a party impeaches a will on account of insanity in the testator, he must establish such insanity by clear and satisfactory proof; for the instrument purporting on its face a legal act, sanity must be presumed until the contrary is shown.¹ At the same time it should be borne in mind that the presumption of sanity is not to be treated as a legal presumption, but at the utmost as a mixed presumption of law and fact (if not as a mere presumption of fact); that is, an inference from the absence of evidence to show that the testator had not that mental soundness which experience shows to be the general condition of the human mind. If, therefore, a will is produced before a jury, and its execution proved, and no other evidence offered, the jury would be properly instructed to find for the will. And if the party opposing the will gives some evidence of incompetency, the

¹ 1 Wms. Exrs. 20, citing *Groom v. Thomas*, 2 Hagg. 434, and *Burrows v. Burrows*, 1 Hagg. 109.

jury may, nevertheless, find in favor of the will if it does not disturb their belief in the testator's competency. And in such case the presumption of competency would prevail. Still the *onus probandi* lies in every case on the party alleging a will, and he must satisfy the jury that it is the will of a capable testator; and when the whole matter is before them on evidence given on both sides, if the evidence does not satisfy them that the will is the will of a competent testator, they ought not to affirm by their verdict that it is so.¹ The same considerations should apply where it is a judge instead of a jury who decides upon the evidence.

On the whole, therefore, the English rule appears to be, that if a will rational on the face of it is shown to have been duly executed, it is presumed, in the absence of any evidence to the contrary, that it was made by a person of competent understanding. But if there are circumstances not merely opposed to, but sufficient to counterbalance that presumption, the decree must be against the validity of the will, unless the evidence, taken altogether, is sufficient to establish affirmatively that the testator was of sound mind when he executed it.² Such a statement seems to import, and correctly too, that the burden being on the proponent of the will throughout, he has made out his *prima facie* case of testamentary capacity when he shows a rational instrument properly signed and witnessed. But, on the other hand, the evidence establishing due execution should leave a favorable impression of competency; and testamentary incapacity may be established by the mere cross-examination of the proponent's witnesses, without any direct evidence on the part of the contestant.³

¹ 1 Wms. Exrs. 21; Sutton v. Sadler, 3 C. B. N. S. 87; Symes v. Green, 1 Sw. & Tr. 401; Keays v. M'Donnell, 6 Ir. Eq. 611. The rules stated in the text are formulated from Sutton v. Sadler, which is a leading case in point. Here was an action by the heir-at-law against devisees, and the validity of a will was involved.

² 1 Jarm. Wills, 35, note; Symes v. Green, *supra*.

³ Keays v. M'Donnell, 6 Ir. Eq. 611.

"The strict meaning of the term '*onus probandi*' is this," says Baron Parke: "that if no evidence is given by the party on whom the burden is cast, the issue must be found against him. In all cases this onus is imposed on the

§ 174. **American Authorities on this Subject.**— These English authorities embody the best elementary rules, we think, for resolving a conflict of principles, which, after all, is more apparent than real; holding the proponent to his general proof, while giving to the presumption of sanity all that can be fairly claimed for it. From this point of view, the presumption in favor of sanity where testamentary causes are tried is not a legal one, but one of fact; and the *prima facie* case in favor of the proponent, when the will is assailed as the offspring of insanity, not only does not relieve him from establishing capacity as the ultimate conclusion upon the whole evidence, but is itself the result of facts he has established at the outset, a first stage reached in propounding the will. The will, not an irrational one on its face, is shown to have been properly executed and witnessed; hence it may fairly be presumed that the testator was competent and unrestrained in disposing of his property; but these presumptions, being of fact or mixed law and fact, may be rebutted, and the proponent has nothing more than a *prima facie* case in his favor.

In various States, however, the presumption in favor of sanity has been styled a legal presumption, and appears to have been so treated in testamentary causes. In an important Massachusetts case, a majority of the court ruled that the legal presumption, in the absence of evidence to the contrary, is in favor of the sanity of a testator; a statement from which one judge dissented, though all the court agreed that this does not change the burden of proof, which always rests upon those seeking the probate of the will.¹ The New York doctrine (agreeably to the common law and the local statute expression) is stated quite recently to the same effect: namely, that the legal presumption, to begin with, is that every man

party propounding a will; it is in general discharged by proof of capacity and the fact of execution." And he further proceeds to show that the fact of capacity is so far involved in the proof of the execution, that the other party may cross-examine the subscrib-

ing witnesses upon that point. *Barry v. Butlin*, 1 Curt. 637.

¹ *Baxter v. Abbott*, 7 Gray, 71, 83 (1856), Thomas, J., dissenting. Cf. *Crowninshield v. Crowninshield*, 2 Gray, 524.

is *compos mentis*, and the burden of proof that he is *non compos mentis* rests on the party who alleges that condition of mind. "But it is also the rule," adds the court, "that, in the first instance, the party propounding the will must prove the mental capacity of the testator."¹ Other opinions are expressed to the same effect.² A discrepancy of statement in this respect, however, is sometimes referred to a construction of the local statute of wills.³

This difference, though much dilated upon, is more verbal than substantial, as commonly applied. All, or most, of our decisions agree in substance, that whether as a legal presumption or as a presumption of fact or mixed presumption, amounting only to a *prima facie* case, there exists, upon proof that the will, a natural one on its face, was duly executed by an adult not otherwise incapacitated, a presumption in favor of the testator's sanity which they who impeach the will are bound at this stage to overcome.⁴ And the larger and better class of American authorities point, moreover, to the conclusion that the court or jury trying the case must, upon the whole evidence, be satisfied that the testator was of sound mind; so that if there be inevitable doubt left on this point from all of the testimony, the will cannot be considered as proved.⁵ This conforms practically to the English rule already stated.⁶

¹ *Harper v. Harper*, 1 N. Y. Supr. 351, citing *Delafield v. Parish*, 25 N. Y. 9.

² See Perkins's ample note to 1 Wms. Exrs. 21, Am. edition; *Aikin v. Weckerly*, 19 Mich. 482.

³ See Hoar, J., in *Baldwin v. Parker*, 99 Mass. 79; *Knox's Appeal*, 26 Conn. 20.

⁴ 1 Wms. Exrs. 21, Am. Ed., note by Perkins; *Cotton v. Ulmer*, 45 Ala. 378; *Thompson v. Kyner*, 65 Penn. St. 368; *Perkins v. Perkins*, 39 N. H. 163; *Kempsey v. McGinnis*, 21 Mich. 123; *Herbert v. Berrier*, 81 Ind. 1; *Day v. Day*, 2 Green Ch. 549; *Fee v. Taylor*, 83 Ky. 259; 130 Ill. 69; *Wilbur v.*

Wilbur, 129 Ill. 392; *McCulloch v. Campbell*, 49 Ark. 367; *Allen v. Griffin*, 69 Wis. 529; *Wagner v. Ziegler*, 44 Ohio St. 59.

⁵ *Crowninshield v. Crowninshield*, 2 Gray, 524; *Delafield v. Parish*, 25 N. Y. 9; *Robinson v. Adams*, 62 Me. 369; *McGinnis v. Kempsey*, 27 Mich. 363; 1 Jarm. Wills, 38, Bigelow's note; *Turner v. Cook*, 36 Ind. 129; *Tingley v. Cowgill*, 48 Mo. 291; *Williams v. Robinson*, 42 Vt. 658; *Aikin v. Weckerly*, 19 Mich. 482; *Knox's Appeal*, 26 Conn. 20; *Renn v. Lamon*, 33 Tex. 760; *Thompson v. Kyner*, 65 Penn. St. 368; *Boardman v. Woodman*, 47 N. H. 120; *Wetter v. Habersham*, 60 Ga. 193; 26

⁶ *Supra*, § 173.

§ 175. **The Same Subject; whether Subscribing Witnesses must first testify as to Insanity.**—The more difficult inquiry suggested in this connection relates to the duty of offering positive proof of capacity from the witnesses to the will. One would suppose that the simple fact that two witnesses or more (according as the local statute may have prescribed), append their signatures in the execution of the will, strengthens materially any presumption which may arise in favor of the testator's sanity, or the *prima facie* case on behalf of the will. For why should two or three have signed thus, unless intending some sort of a voucher that the testator appeared to know what he was about? Though, to be sure, if any

Penn. St. 404; *Day v. Day*, 2 Green Ch. 549; 2 Rich. 229. "In the course of the trial the balance of testimony may fluctuate from one side to the other, but the burden of proof remains where it was at the outset; and unless at the close of the trial the balance is with the proponent, he must fail. It is not sufficient that the scales stand even; there must be a preponderance in his favor." *Per curiam* in *Williams v. Robinson*, *supra*.

In some opinions quite extreme ground is taken against any presumption of a testator's sanity. *Williams v. Robinson*, 42 Vt. 658, is a case in point. One would suppose, from the remarks here made by the court, that the capacity of the testator must be affirmatively proved by the proponent of any will, contest or no contest; and that no presumption arises in favor of the will, even upon proof of its due execution. But allowance should be made for warmth of expression in discussing an abstract question; and the decision bore simply in favor of placing the burden throughout upon the party propounding the will, and not the contestant. See also *Robinson v. Adams*, 62 Me. 369; *Knox's Appeal*, 26 Conn. 20. "The presumption that the person making a will was at the time sane, is not the same as in the case of the making of other instruments; but the

sanity must be proved." *Gerrish v. Nason*, 22 Me. 438. And see *Cilley v. Cilley*, 34 Me. 162. And opinions like these distinguish wills from such instruments as a deed or contract, which, if executed, are presumed to be rationally executed; or construe in support of their theory such local statutes as provide that "all persons of sound mind" may make wills.

But in *Higgins v. Carlton*, 28 Md. 115, not only is the distinction taken between deeds and wills repudiated, but the presumption of sanity is asserted quite as strongly in the other direction. And here it is ruled with emphasis that the burden of proof lies upon the person who asserts unsoundness of mind. See also the judicial remarks in *Sloan v. Maxwell*, 2 Green Ch. 580; *Tyson v. Tyson*, 37 Mo. 567; *Grubbs v. McDonald*, 91 Penn. St. 236.

The safer opinion steers between these two extremes; and nothing better reconciles the discrepancy of opinions as thus expressed (for, after all, some discrepancy must be admitted) than to compare the cases by their respective decisions upon the facts actually presented. If we do this, we shall find the conflict reduced to a very narrow range. Where no evidence of incapacity is produced, very slight evidence of capacity should, at all events, be enough.

such witness were closely questioned in court, his testimony might prove the reverse of favorable on this point.¹ Unfortunately, in this country wills are witnessed out of good nature by persons who seem quite heedless of the responsibility they incur in so doing; and it is distinctly ruled that by the mere fact of attestation no presumption is afforded of any opinion which the witness may have had, favorable or unfavorable, concerning the sanity of the testator.² But the cases on this point are not quite harmonious; and we may still infer that wherever execution is proved of a will natural and regular upon its face, and there is an absence of further evidence upon the point of sanity, the proponent ought to be entitled to probate.³

This brings us to the real practical difference between American cases which hold to the presumption of sanity with greater or less force: namely, that in some courts, contrary to the general opinion, it is held that the party propounding a will must not only prove execution, but must also offer positive proof of his testator's capacity. Thus, in Massachusetts practice, the subscribing witnesses are called upon to testify not only concerning the fact of execution, but as to the testator's mental condition besides. Without such proof, it is said, no will can be set up.⁴ Should their testimony be favorable, the *prima facie* case in favor of probate is no doubt strongly fortified; if the reverse, little remains

¹ By English tribunals, a subscribing witness who deliberately purposes to testify against the will, is looked upon with great disfavor. In *Tatham v. Wright*, 2 Russ. & My. 1, where two subscribing witnesses had declared they would testify against the testator's capacity, Tindal, C. J., made this severe comment: "The real question is, whether these witnesses are to be believed upon this evidence, in contradiction to their own solemn act in the attestation. . . . That is the problem to be solved." And see § 181, *post*.

² *Baxter v. Abbott*, 7 Gray, 71; *Boardman v. Woodman*, 47 N. H. 120;

Thompson v. Kyner, 65 Penn. St. 368. And see *Williams v. Robinson*, 42 Vt. 664, 665.

³ *Perkins v. Perkins*, 39 N. H. 169, and cases cited; *Baxter v. Abbott*, 7 Gray, 71; *Delafield v. Parish*, 25 N. Y. 9; *Wilbur v. Wilbur*, 129 Ill. 392.

⁴ *Brooks v. Barrett*, 7 Pick. 94; *Crowninshield v. Crowninshield*, 2 Gray, 524, *per* Thomas, J.; *Gerrish v. Nason*, 22 Me. 438. "The presumption, therefore, that the person making a will was, at the time, sane, is not the same as in the case of the making of other instruments, . . . but the sanity must be proved." 22 Me. 438, 441.

of the presumption, legal or otherwise, in favor of sanity. But even in Massachusetts, were all the witnesses to the will dead, incapable, or in unknown parts, so that none could be produced, the execution of the will could be proved by evidence of their handwriting; and upon this proof, without other evidence showing sanity or insanity, the proponent would be entitled to probate.¹ In many, perhaps most, of our courts, no evidence of the testator's competency, nothing beyond the mere formal proof of execution in aid of the natural presumption of sanity is requisite in order to make out a *prima facie* case in favor of the will.² And on the whole, American authority preponderates to the view that when the witnesses produced for probate are not only questioned upon the fact of execution, but asked besides whether they regarded the testator as of sound and disposing mind and memory, this last is form merely, or at least precautionary, and not indispensable to establishing the presumption of capacity upon which probate should be granted.³

¹ *Baxter v. Abbott*, 7 Gray, 71.

² *Perkins v. Perkins*, 39 N. H. 163; *Beaubien v. Cicotte*, 8 Mich. 9; *Taff v. Hosmer*, 14 Mich. 309; *Thompson v. Kyner*, 65 Penn. St. 568. That the party propounding the will is not obliged to examine the witnesses, in the first instance, beyond the fact of execution, and may then wait till some impeachment of the instrument is offered by counter-proof, conforms to the English rule. *Supra*, § 173; *Sutton v. Sadler*, 3 C. B. N. S. 87.

³ See *Thompson, C. J.*, in *Thompson v. Kyner*, 65 Penn. St. 368. And *Bell, C. J.*, in *Perkins v. Perkins*, 39 N. H. 163, 168, explains this practice (which pertains in Pennsylvania, New Hampshire, and many other States as well as Massachusetts), consistently with the presumption of sanity. "Its object is," he says, "that if it appears that there is either doubt or suspicion on the question, that doubt may be removed before the estate is placed in the hands of a man who may prove to have no title to

it. . . . That the rule of law, requiring that the attesting witnesses to a will shall be examined in relation to the sanity of the testator, is not founded on the absence of a presumption that the testator is sane, nor on a necessity that the propounder of the will should offer further evidence of the fact of the testator's sanity, is, we think, apparent from the state of the law as to cases where, from their death, or absence from the jurisdiction, the witnesses cannot be produced, or where, from loss of recollection, they are unable to testify. As to these cases, proof of the handwriting of the witnesses, and, in some jurisdictions, of the handwriting of the testator, is competent proof to be submitted to the jury of the due execution of the will. In such cases, there can, of course, be no examination of the witnesses as to the sanity of the testator, and it is nowhere laid down that the party is under any obligation to produce any other evidence upon that point, except the testi-

§ 176. **When Evidence of Unsoundness appears from Examination of Witnesses, Proponent must overcome it.**—According to the better opinion, if witnesses to the will, in the course of their examination, give testimony which leaves a genuine doubt of the sanity of the testator at the date of execution, the proponent cannot rely upon any general presumption of sanity in aid of his proof that the instrument was formally executed; he cannot claim that no evidence of insanity has been given by the contestant or, if given, that it will no more than balance the presumption on his side; but having himself the general burden of proving capacity, he must turn the scale, or the will he offers is not established.¹

There are States, it is true, in which the court lays down a rule less favorable in expression to the party who assails a will. Testamentary capacity, observes a Pennsylvania case, is the normal condition of one of full age, and the affirmative is with the party who undertakes to call it in question; and this affirmative must be established, not in a doubtful, but in a positive manner.² And other *dicta* may be found, bearing quite as strongly against the contestant who sets up insanity.³ But when, aside from such *dicta*, we examine the facts passed upon by the court, we shall find that the decision quite accords with the proposition we have advanced; that the

mony of the attesting witnesses. From the rule of law thus stated, we think that, although the subscribing witnesses, if they can be produced, must be examined in relation to the soundness of the testator's mind, yet the party propounding a will for probate is under no general duty to offer any evidence of the testator's sanity, but may safely rely upon the presumption of the law that all men are sane until some evidence to the contrary is offered."

Statutes sometimes undertake to specify the proof required. As in Minnesota, where the burden is put ultimately upon the proponent of the will. 40 Minn. 371.

¹ See *Aikin v. Weckerly*, 19 Mich.

482, and cases cited. Here three witnesses testified. One of them appears to have given no opinion as to the testator's sanity; and of the other two, one testified that the testator was sound, and the other that he was unsound. See also *Sutton v. Sadler*, 3 C. B. N. S. 87; *Symes v. Green*, 1 Sw. and Tr. 401. See *Keays v. M'Donnell*, 6 Ir. Eq. 611, that it is enough for the contestant to break down the witnesses by a cross-examination. And see *supra* § 173.

² *Grubbs v. McDonald*, 91 Penn. St. 236, citing other Pennsylvania cases on this point.

³ *Delafield v. Parish*, 25 N. Y. 9, propositions laid down by a majority of the court; *Frear v. Williams*, 7 Baxt. 550; 44 N. J. Eq. 154.

witnesses to the will, so far as their testimony had been drawn out, affirmed the capacity of the testator; in short that there was no equipoise, but a turn of the scales in favor of sustaining the will. At such a posture the proponent may well rest his case unless the contestant has some affirmative proof of insanity to offer. But certainly, where there is evidence tending to show insanity, the court must not rule peremptorily against those who oppose the will.¹

On an issue as to testamentary capacity, where the evidence is conflicting, after a fair trial before a jury (as our probate appeals from the county judge as trier are commonly conducted), to whom the proof is submitted under proper instruction, the finding of the jury concludes the point.

§ 177. **Production of Subscribing Witnesses if possible.**—Wherever a will is offered for probate, the subscribing witnesses are the primary and chief resource for establishing the instrument to the satisfaction of the court or jury. These witnesses, varying in number under our local enactments, from two to three or more, should be produced if possible, in case of a contest; but in uncontested wills, a less number, perhaps one, may usually suffice; while in some States, even when opposed, the proponent calls only such witnesses as may give him a good *prima facie* case, and there rests.² If a witness be dead, incapable, or in parts unknown, his handwriting is proved, and such issues as the present must necessarily be determined without him.

As to the production, if possible, of all the subscribing witnesses by the party propounding the will, where an issue is made, the American rule is not uniform. In Vermont, for instance, all must be produced and examined by the proponent unless this is shown to be impracticable.³ The New Hampshire rule favors summoning all who are alive, capable and within the jurisdiction where controversy arises.⁴ In

¹ Reichenbach v. Ruddach, 127 Penn. St. 564. Alexander v. Beadle, 7 Coldw. 126. A witness not within reach of State process need not be produced. 60 Vt. 524.

² Thornton v. Thornton, 39 Vt. 122. See as to attestation, etc., *post*.

³ Thornton v. Thornton, 39 Vt. 122; ⁴ Whitman v. Morey, 63 N. H. 448.

Connecticut, on the other hand, the party propounding the will need not produce all within reach of process at his own instance, nor unless the contestant insists upon it; and the latter, by not insisting, will be presumed to have waived his privilege in that respect.¹ Still less ought the proponent, if he has produced all these witnesses in court, to be compelled invariably to ask each one to testify; for any subscribing witness he may have omitted, the contestant can call to the stand; and one does not choose to weaken his own cause. A subscribing witness, after being examined by the one party may be cross-examined by the other.²

§ 178. **Testimony of Subscribing Witnesses Important, but not Conclusive.** — Great weight is attached to what these subscribing witnesses may have to say concerning the testator's apparent mental condition and all the circumstances surrounding the execution of the will. Examination and cross-examination may elicit from them much that is vitally important on the issue of testamentary capacity. But though these parties are witnesses for the will, and the proponent may be bound to produce or account for them, or even to examine all in turn, they are not his witnesses in any such sense as to debar him from discrediting their testimony whenever it bears against the instrument he has offered for probate. The final decision of the case does not depend upon them, but upon all the evidence adduced on both sides. And the fact that any or all of the subscribing witnesses testify against the testator's mental capacity, does not conclude the proponent, if other witnesses testify favorably; for the will may be established upon sufficient proof in opposition to the testimony of the subscribing witnesses.³

§ 179. **English Practice as to producing the Subscribing Witnesses.** — The English ecclesiastical courts, under the system

¹ Field's Appeal, 36 Conn. 277. At- Martin v. Perkins, 56 Miss. 204; Frear testation, *post*. v. Williams, 7 Baxt. 550, 556; Alexander v. Beadle, 7 Coldw. 126; Garrison v. Garrison, 15 N. J. Eq. 266; Turner v. Cheesman, ib. 243.

² He may be thus discredited. 64 Md. 138.

³ Thornton v. Thornton, 39 Vt. 122;

prevalent in that country before probate courts were instituted, had no jurisdiction of wills affecting real estate; and disputes of title under such wills were usually adjudicated in the common-law courts on the issue of *devisavit vel non*, or else in an action of ejectment. To these courts, an equity tribunal would send an issue of this kind for trial, under its own directions; and one standing direction was, that in proving a will, the proponent should produce all the subscribing witnesses at the trial, unless this should be shown impracticable or the opposite party waived the requirement.¹

The general rule in English courts, when such issues are tried, is, that the proponent of the will must produce all the subscribing witnesses available and make them his witnesses, giving to the contestant an opportunity to cross-examine them.² But under peculiar circumstances the court will dispense with this necessity, especially if all the witnesses have been produced in court by the proponent, so that the other party might have called the omitted witness.³

§ 180. Declaration of Deceased or Absent Subscribing Witnesses Incompetent as to Sanity or Insanity. — The declarations of a deceased subscribing witness, or of one beyond the jurisdiction, tending to show that he thought the testator sane or insane, are incompetent testimony on the issue of sanity or insanity.⁴

§ 181. How Witnesses may test Capacity for themselves; they should not execute unless satisfied. — Dr. Taylor lays down this rule for testing the mental capacity of a person to do an act requiring a sound and disposing mind. "If a

¹ Story Eq. Jur. § 1447; 1 Redf. Wills, 34; Ogle v. Cook, 1 Ves. Sen. 177; Tatham v. Wright, 2 Russ. & My. 1.

² Ib.; Tatham v. Wright, 2 Russ. & My. 1; Barry v. Butlin, 1 Curt. 637; Keays v. M'Donnell, 6 Ir. Eq. 611.

³ Lowe v. Joliffe, 1 W. Bl. 365; Tatham v. Wright, *supra*.

In Tatham v. Wright, the peculiar

situation of the parties litigant was that a bill was filed, not by the devisee seeking to establish the will, but by the heir-at-law calling upon the court to declare it void.

⁴ Baxter v. Abbott, 7 Gray, 71; Sewall v. Robbins, 139 Mass. 164; Boardman v. Woodman, 47 N. H. 120; Thompson v. Kyner, 65 Penn. St. 368. See Williams v. Robinson, 42 Vt. 664.

medical man be present when the will is made, he may easily satisfy himself of the state of mind of the testator by requiring him to repeat from memory the mode in which he has disposed of the bulk of his property. Medical men have sometimes placed themselves in a serious position by becoming witnesses to wills under these circumstances, without first assuring themselves of the actual mental condition of the testator. It would always be a good ground of justification, if, at the request of the witness, the testator had been made to repeat substantially the leading provisions of his will from memory. If a dying or sick person [or any other one] cannot do this without prompting or suggestion, there is reason to believe that he has not a sane and disposing mind."¹

This rule meets the warm approval of so high an American authority as Judge Redfield;² but it must be confessed, that in this country, at least, testators are not disposed to submit to catechising from those whom they may have called in to witness their wills, nor even to state to them confidentially the details of testamentary disposition. The bystander may however, on his part, well refuse to take the responsibility of a subscribing witness, where he suspects that the will is an absurd or unjust one, or strongly doubts whether the testator himself freely and intelligently executes it. Persons in these days are of too accommodating a disposition about lending their signatures in such a case and then stultifying themselves at the probate.³ One should only subscribe as witness

¹ Ray Med. Jur. 658.

² Redf. Wills, 95.

³ Judge Redfield condemns in unqualified terms the practice, too common in the United States, of heedlessly witnessing a will without regard to the propriety of its execution under the peculiar circumstances. "It seems to be considered," he justly observes, "that they are only witnesses to the act of signing. But when it is considered that the witnesses to a will must certify to the capacity of the testator, as well as to the act of execution, the transaction begins to assume a somewhat different

aspect. One who put his name as a witness to the execution of a will, while he was conscious the testator was not in the possession of his mental faculties, places himself very much in the same attitude as if he had subscribed as witness to a will which he knew to be a forgery, which every honorable man could only regard as becoming accessory to the crime by which the will was fabricated; so that it is not improbable that the want of proper appreciation of the discredit resulting from the act of becoming a witness to the execution of a will, by one confessedly incompe-

when he can conscientiously testify without reserve in favor of the will and its proper execution; and it is for the true interest of every rational testator to procure witnesses who will stand resolutely by the transaction against all insidious or open opposition to the probate.

§ 182. **The Same Subject.** — “No person,” says Chancellor Walworth on this point in clear and emphatic language, “is justified in putting his name, as a subscribing witness, to a will, unless he knows from the testator himself that he understands what he is doing. The witness should also be satisfied, from his own knowledge of the state of the testator’s mental capacity, that he is of sound and disposing mind and memory. By placing his name to the instrument, the witness, in effect, certifies to his knowledge of the mental capacity of the testator, and that the will was executed by him freely and understandingly, with a full knowledge of its contents. Such is the legal effect of the signature of the witness, when he is dead, or is out of the jurisdiction of the court.”¹

tent to the proper understanding of the instrument, may, and probably does, result chiefly, with us, from the general misapprehension of the law upon the subject, rather than from any settled disposition to disregard its dictates if correctly understood.” 1 Redf. Wills, 96.

That the person who knows nothing of the contents of the will which he is called upon to witness, signs at a disadvantage, and might, when the instrument is afterwards exposed for probate, appreciate circumstances attending the act of execution, while the testator was feeble, failing in mind, and surrounded by advisers or interested parties, differently from what he did when present at the execution and participating in the act, is obvious. This is a peril to which the testator has exposed the will by his chosen secrecy. But, aside from such a consideration, the witness who subscribes and then discredits the instrument at the probate, has seriously com-

promised his honor. And if a professional man, who fully comprehends what the law expects of his testimony, he cannot excuse a folly so disastrous in its consequences.

¹ *Scribner v. Crane*, 2 Paige, 147. See also *Garrison v. Garrison*, 15 N. J. Eq. 266.

Lord Camden early pointed out how peculiar a stress the Statute of Frauds had laid upon the quality of the witnesses to a testament as distinguished from those in other transactions. A will, he observes, is the only instrument in this statute required to be attested by subscribing witnesses at the time of execution. “It was enough for leases and all other conveyances to be in writing. These were all transactions of health, and protected by valuable considerations and antecedent treaties. The power of a court of equity was fully sufficient to meet with every fraud that could be practised in these cases, after the con-

§ 183. **Effect of a Statement in the Attestation Clause, vouching for the Testator's Sanity.** — The attestation clause in a will might well be drawn so as to certify expressly the belief of the subscribing witnesses that the testator at the time of execution was of sound mind and memory. To contradict under oath at the trial such a writing must greatly discredit a subscribing witness unless he can account for the discrepancy; as for instance, by showing that he signed doubtfully and with little opportunity to judge, and that the contents and character of the will, when exposed to view, convinced him to the contrary; and even thus, his honest opinion should carry very little weight in the case.¹

§ 184. **Proponent goes forward and has Right to open and close the Case.** — Since the party setting up the will has the general burden to establish it, the rule is that he goes forward in the proof and has the opening and close of the case;² and such is the general practice where sanity is at issue.³ But in Maryland the practice conforms to the extreme view

tract was reduced to writing. But a will was a voluntary disposition, executed suddenly (not unfrequently) in the last sickness, oftentimes almost in the article of death. And the only question that can be asked in this case is, Was the testator in his senses when he made it? And consequently the time of execution is the critical minute that requires guard and protection. Here you see the reason why witnesses are called in so emphatically. What fraud are they to prevent? Even that fraud so commonly practised upon dying men whose hands have survived their heads; who have still strength enough to write a name or make a mark, though the capacity of disposing is dead. What is the condition of such an object, in the power of a few who are suffered to attend him, wheedled or teased into submission for the sake of a little ease? Put to the laborious task of recollecting the full estate of all his affairs, and to weigh the just merits and demerits of those who

belong to him, by remembering all and forgetting none. . . . Who, then, shall secure the testator, in this important moment, from imposition? Who shall protect the heir-at-law, and give the world a satisfactory evidence that he was sane? The statute says, three credible witnesses." *Hindson v. Kersey*, 4 Burns Eccl. Law, 85, 88. See also *Tindal, C. J., in Tatham v. Wright*, 2 Russ. and My. 1, cited *supra*, § 175.

¹ See *Garrison v. Garrison*, 15 N. J. Eq. 266; pt. III. c. 3, *post*.

² *Supra*, § 170.

³ *Boardman v. Woodman*, 47 N. H. 120; *Robinson v. Adams*, 62 Me. 369; *Brooks v. Barrett*, 7 Pick. 96; *Comstock v. Hadlyme*, 8 Conn. 261; *Taff v. Hosmer*, 14 Mich. 309; *Kempsey v. McGinniss*, 21 Mich. 123; *Williams v. Robinson*, 42 Vt. 658; *Syme v. Boughton*, 85 N. C. 367; *Theological Seminary v. Calhoun*, 25 N. Y. 422; 1 Bradf. 69, 94.

taken upon the presumption of sanity; and caveators who assert unsoundness of mind are regarded as plaintiffs with the burden of proof upon them, and they have the right to open and close.¹ The same rule obtains in Delaware.² And in some States it is held that on appeal from the probate court in such trials the appellant becomes the actor and has the opening and close both in evidence and argument.³

§ 185. **Questions of Validity at Issue; Testamentary Capacity to be determined upon all the Evidence.**—As a general rule, wherever the issue is presented, whether a certain document propounded is the last will of the deceased, all questions affecting the validity of the instrument may be presented.⁴ And testamentary capacity or incapacity becomes in the main a decision of fact upon all the evidence presented.⁵

§ 186. **Testamentary Capacity at the Date of the Transaction the Real Point at Issue.**—Nor should it be forgotten that testamentary capacity or incapacity at the precise date of the transaction is the real point at issue. Hence the condition of the testator's mind shortly before or after executing the instrument, is only of importance so far as it establishes his mental condition when the execution actually occurred. The fact of a testator's subsequent suicide, of his sudden death from apoplexy, or even of an attack of apoplexy shortly before he made his will, bears simply upon that point, as we have already shown.⁶ And from the instances already adduced one may gather how strong, on the whole, should be the

¹ *Brooke v. Townshend*, 7 Gill, 24; *Higgins v. Carlton*, 28 Md. 115; *Tyson v. Tyson*, 37 Md. 567.

² *Chandler v. Ferris*, 1 Harring. 460.

³ *Rice* (S. C.), 35, 271. See *Runyon v. Price*, 15 Ohio St. 1, for the will in appeals under the local statute.

⁴ *Davis v. Rogers*, 1 Houst. 44.

⁵ *Gardiner v. Gardiner*, 34 N. Y. 155.

⁶ *Supra*, §§ 119, 120. See *Lewis's Will*, 51 Wis. 101, where the will of one who had an epileptic fit shortly before

and shortly after executing it was sustained; also *Brown v. Riffin*, 94 Ill. 560. As to suicide, see *Burrows v. Burrows*, 1 Hagg. 109; *Elwee v. Ferguson*, 43 Mo. 479; *Duffield v. Robeson*, 2 Harring. 375; *Godden v. Burke*, 35 La. An. 160; *Brooks v. Barrett*, 7 Pick. 94. Hence mental condition on the day before or the day after making a will is admissible to show mental condition on the day of making the will. *Dyer v. Dyer*, 87 Ind. 13.

proof of a testator's insanity in order to invalidate the instrument offered as his last will and testament.

§ 187. **Various Matters of Proof bearing upon this Issue; Insanity once shown, presumed to continue, etc.** — When the habit of general insanity is once shown to have existed not very long before the execution of the will in question, it will be so far presumed to have continued to the date of execution that the proponent must overcome this unfavorable presumption before the will he offers can be established.¹ So, too, does proof that the testator was under guardianship for insanity quite discredit his will.² But all unfavorable presumptions of this kind, whether stronger or weaker, may be removed by appropriate testimony;³ and it is sufficient for the proponent to show that such insanity had ceased to exist when the will was executed, or that it never existed at all, or that the will was made during some lucid interval or respite from the malady.⁴

If, however, the insanity shown were something of a temporary nature, such as might be produced by fever, by a passing delirium, by some accident, and not a fixed and habitual derangement, no strong presumption, and in many cases no presumption at all, would operate to disturb that *prima facie* case which the due execution of a rational will, by one apparently rational, makes out.⁵ The earlier the date of the alleged insanity, as shown against the will, the less conclusive must,

¹ *Smith v. Smith*, 4 Baxt. 293; *Harrison v. Rowan*, 3 Wash. C. C. 586; *Swinb. Wills*, pt. 2, § 3; 1 *Hall P. C.* 30; *Townshend v. Townshend*, 7 Gill, 10. "No position can be better established than that, if a testator, a short time before making his will, be proved to have been of unsound mind, it throws the burden of proof upon those who come to support the will to show the restoration of his sanity. This must be understood to mean a general and fixed insanity." *Halley v. Webster*, 21 Me. 461, by Whitman, C. J.

² *Supra*, §§ 81, 82; *Little v. Little*, 13 Gray, 264. So as to an inquisition

of lunacy. *Rider v. Miller*, 86 N. Y. 507; *supra*, §§ 81, 82; *Stevens v. Stevens*, 127 Ind. 560.

³ *Supra*, §§ 81, 82; *Rice v. Rice*, 50 Mich. 448.

⁴ *Cartwright v. Cartwright*, 1 Phillim. 100; *Boyd v. Eby*, 8 Watts, 66; *Jackson v. Van Dusen*, 5 Johns. 144; *Goble v. Grant*, 2 Green Ch. 629; *supra*, §§ 72, 88, 107.

⁵ *Lord Eldon in Holyland, Ex parte*, 11 Ves. 11; *Hix v. Whittemore*, 4 Met. 545; *Staples v. Wellington*, 58 Me. 453; *Halley v. Webster*, 21 Me. 461; *McMasters v. Blair*, 29 Penn. St. 298; *Townshend v. Townshend*, 7 Gill, 10. And see *supra*, §§ 122, 127.

of course, be the force of such testimony;¹ and since incapacity just when the will was made is the true issue, proof that the testator was insane years after its execution is of very trivial consequence.²

There is, therefore, no such unqualified presumption of law as "once insane, always insane"; but the peculiar circumstances connected with the malady of the individual testator must be considered in deciding its effect upon the burden of proof, or determining how far the same condition of mind may be inferred at any later or earlier period.³

§ 188. **The Same Subject: Proof of General Insanity.**—As we have already seen, the character of the will itself, whether natural or unnatural, reasonable or absurd, just or unjust, bears strongly upon the issue of general insanity, and the more so when its provisions show a radical and unaccountable change from the testator's normal purpose. Yet we have also seen that one may capriciously change his purpose, and that a will which disposes harshly, foolishly, or unequally, is not to be set aside for that cause if the testator were really sane when he made it.⁴ We have seen that, in connection with the contents and character of the will itself, the manner in which it was written and executed, may aid in establishing sanity or insanity. Thus, where the will was written out entirely by the testator's own hand, this fact bears greatly in its favor.⁵ Yet wills clearly expressed in the testator's own hand-writing have been set aside on proof of his insanity.⁶ We have seen that a testator may be irritable in temper, morose, profane, miserly, squalid, dishonest, devoid of affection, proud, selfish, and yet, being sane, his will cannot be impeached;⁷

¹ *Hix v. Whittemore*, and *Halley v. Webster*, *supra*.

² *Taylor v. Cresswell*, 45 Md. 422.

³ See *Dewey, J.*, in *Hix v. Whittemore*, 4 Met. 545.

⁴ *Supra*, §§ 77, 112; *Coleman v. Robertson*, 17 Ala. 84; *Stubbs v. Houston*, 33 Ala. 555; *Goble v. Grant*, 2 Green Ch. 629; *Ross v. Christmas*, 1 Ired. 209; *Baker v. Lewis*, 4 Rawle, 356; *Munday*

v. Taylor, 7 Bush. 491; *Whitman v. Morey*, 63 N. H. 448.

⁵ *Supra*, § 113; *Cartwright v. Cartwright*, 1 Phillim. 90; *Temple v. Temple*, 1 Hen. & M. 476; *Overton v. Overton*, 18 B. Mon. 61.

⁶ See *Symes v. Green*, 1 Sw. & Tr. 401; 1 Phillim. 90.

⁷ *Supra*, §§ 77, 158; *Lewis Re*, 33 N. J. Eq. 219; *Coleman v. Robertson*

at the same time that all such manifestations, at and about the time of the testamentary act, may, especially if indicating a sudden perversion of the mind from its natural channel, be shown in connection with other facts, as tending to prove insanity.¹ We have seen that mere eccentricity is not insanity; and yet eccentric freaks may be a symptom of insanity.² We have seen that one may make a valid will who does not manage his business affairs; and yet incapacity to manage one's affairs is a circumstance for consideration.³ We have seen, in fine, that the intellect may flare wildly or burn low in the socket; and yet that a testator has sufficient mental capacity to make a will when he understands fully and in detail, without prompting, what he is doing and how he is doing it, what is his property and how he wishes to dispose of that property among those naturally entitled to his bounty; or in other words, so long as he has sufficient intelligence to understand and appreciate the testamentary act in its different bearings, and no longer.⁴

17 Ala. 84; *Nicholas v. Kershner*, 20 W. Va. 251.

¹ *Conely v. McDonald*, 40 Mich. 150.

² *Supra*, § 152. See *Bristed v. Weeks*, 5 Redf. 529.

³ *Supra*, § 70; *Errickson v. Fields*, 30 N. J. Eq. 634.

⁴ *Supra*, §§ 70, 71. *Banks v. Goodfellow*, L. R. 5 Q. B. 567; *Delafield v. Parish*, 25 N. Y. 10; 42 Barb. 274.

The circumstances in the *Parish Will Case* (42 Barb. 274; affirmed, 25 N. Y. 10) are worth observing; that case being a remarkable one, as putting a practical limit to testamentary capacity which American courts have not since been disposed to transgress, though some had transgressed it before. The litigation came prominently before the public in 1857-1862; the Supreme Court of New York, on appeal from the Surrogate, rejecting three alleged codicils to the will of Mr. Parish, and the court of appeals affirming substantially the decision. Henry Parish, a man of good mental and moral per-

ceptions, refined and gentle susceptibilities, made his will in 1842. In 1849 (having, it appears, some hereditary tendency to mental disorder) he was suddenly struck with a severe apoplexy, which was followed by permanent paralysis or hemiplegia on the right side, and by severe epileptic convulsions which continued until his death in 1856. After the attack, he ceased to be the mild, intelligent, and unruffled man he was before, frequently exhibited ungentlemanly and unbecoming conduct, and underwent a decided mental change. From 1849 to the date of his death he had various painful diseases, such as cholera morbus, inflammation of the lungs, and the formation of an abscess under the jaw which threatened to suffocate him. He would suffer spasms or convulsions at regular intervals, extending from one or two weeks to six months or a year. During this whole period of intermittent agony, the sufferer could neither write nor speak, nor use language in any shape or form

§ 189. **The Same Subject: Proof of Lucid Interval or Restoration.** — The presumption being that general insanity once shown to exist still continues, unless of a temporary sort, like the delirium of drunkenness or a fever, the burden of proof to establish a lucid interval or mental restoration rests upon the party who asserts it.¹ One who offers the will of a testa-

for the expression of his mind. He could see, he could use his left arm, hand, and fingers vigorously, but he could not or would not write. He did not use the dictionary for pointing to words, and when block-letters were placed before him, he pushed them away; symptoms pointing to a diseased state of mind. Expressing himself by signs, gestures, and motions, those signs, gestures, and motions were often contradictory, uncertain, frequently misunderstood, often not comprehended at all. His nurses would read the newspaper to him, but it did not appear that he comprehended what was read, or exhibited any intelligent interest in the reading. After the first attack he was never intrusted with money or the management of his own affairs, and was washed, dressed, and attended like a helpless child. He showed strange freaks and caprices, and had to be guarded from heedless exposure to danger.

Not making it easily understood what he wished, any will he might make, even supposing him rational in making it, would necessarily depend upon the interpreter and the integrity of the interpretation. But as to the three codicils offered for probate, it seems that the counsel employed by the family to prepare them, read them to Mr. Parish in the presence of the subscribing witnesses, put to him the requisite formal questions, and received from him by sound and gesture, as usual, what were supposed to be affirmative replies. The counsel then guided the hand of Mr. Parish while he made his mark. This, at least, was the case when the first and second codicils were executed; whether

or not he received assistance in making his mark at the execution of the third was not clear. These codicils were drawn under the suggestion of Mr. Parish's wife, whose share in the estate was immensely increased by them.

The Surrogate admitted the first codicil to probate, rejecting the second and third; but under the decree of the Supreme Court, which was affirmed on final appeal, all the three codicils were rejected.

We have already shown that the rule prescribing a test of capacity for making wills is here narrowed materially from that in *Stewart v. Lispenard*, 26 Wend. 255, which had hitherto been the leading precedent for New York, if not most other States, on the subject. In that case what were supposed the last wishes of a testatrix, low, too low, in point of capacity, were respected. Here they were set summarily aside. But the discrepancy upon the decided facts is not so great after all; for in the Parish Will Case, codicils unjust in terms and likely to have been unfairly procured were swept aside in favor of a disposition unquestionably rational; while in *Stewart v. Lispenard*, the disposition was just and reasonable, and accorded with the earlier intentions of the deceased; a further proof in connection with the instances elsewhere cited, that in the mind of court, jury, and the general public, the disposition to uphold officious and condemn inofficious wills is too strong for logical consistency to restrain it.

¹ *Cartwright v. Cartwright*, 1 Phillim. 100; *White v. Driver*, 1 Phillim. 88; *supra*, §§ 110, 122; 1 Wms. Exrs. 22; *Gombault v. Public Admr.*, 4 Bradf. 226;

tor shown thus incapable should show, therefore, that the incapacity was, at least, so far removed when the instrument was executed that his reason shone out once more in the transaction.¹ The nature and character of the will and the circumstances attending its execution may aid such an inference; but while no precise measure of proof is set by the law, there must be sufficient to overcome that unfavorable impression which is naturally produced when habitual insanity has been shown to have once existed.² Lucid intervals involve too slight and wavering a departure from confirmed derangement of the intellect to serve as a very positive basis for testamentary capacity to rest upon: while proof that the testator had actually recovered his full mental health after the period of incapacity and before the will was made, well overcomes any presumption of insanity;³ and yet it should be still observed that those once confirmed in this malady, however restored they may appear, are liable to a relapse when some new calamity comes with crushing weight or the faculties decay in the torpor of declining years.

§ 190. **The Same Subject: Proof of Monomania or Insane Delusion.** — Where only partial insanity, or rather monomania, is shown at the trial instead of general insanity, the burden of overcoming this proof and of establishing testamentary capacity, is certainly not so great, if we may trust the preponderance of later English and American authority. For here, as we have shown, the will ought to stand unless the delusion, the monomania, colored, so to speak, the testamentary transaction, and made its particular disposition in effect the product of a deranged mind.⁴ It is true that the mental disorder in question may have extended beyond its outward and visible symptom; and that the insane delusion once

Saxon v. Whitaker, 30 Ala. 237; Haley v. Webster, 21 Me. 461; Lucas v. Parsons, 27 Geo. 593; Harden v. Hays, 9 Penn. St. 151; Goble v. Grant, 2 Green Ch. 629; Jackson v. Van Dusen, 5 Johns. 144; Harden v. Hays, 9 Penn. St. 151; 44 N. J. Eq. 154.

¹ Ib.

² Brogden v. Brown, 2 Add. 445; *supra*, §§ 110, 111; Steed v. Calley, 1 Keen, 620; Gombault v. Public Admr., 4 Bradf. 226; Snow v. Benton, 28 Ill. 306; Wright v. Lewis, 5 Rich. 212; Duffield v. Morris, 2 Harring. 375.

³ See Snow v. Benton, 28 Ill. 306.

⁴ *Supra*, § 159.

shown to exist, a prejudice is created against the will. But the most decisive circumstance against the will, in such a situation, would be that it was unnatural, inofficious, insane in character, tinctured by the delusion to the injury of survivors. For if on the other hand, the jury or court trying the issue of capacity, should feel satisfied that the delusion had not affected the testator's general faculties nor perverted the particular disposition by testament, there is no reason why the will should not be upheld.¹ The burden of proving capacity requires those who propound the will, at all events, to overcome whatever tends to prove that the delusion and the testamentary disposition were connected.²

§ 191. **Proof of Drunkenness, etc.**—The finding of an inquest that a person is an habitual drunkard can be, at the utmost, no more than *prima facie* evidence of incapacity.³ And proof of intemperate habits and occasional fits of wildness, though indicating an impaired mind, is not sufficient to establish a total and permanent want of testamentary power.⁴ Indeed, proof of instances of longer or shorter incapacity from drunkenness should not destroy the usual presumption of general capacity from the proper execution, but the party alleging incapacity should bring his proof to bear more directly upon the time of execution.⁵

§ 192. **Personal History of Testator in an Issue of Insanity, Autopsy, etc.**—The whole personal history of the testator, mental and physical, may be freely ranged over upon the issue of his insanity.⁶ And as insanity is often hereditary and the

¹ See observations of Cockburn, C. J., in *Banks v. Goodfellow*, L. R. 5 Q. B. 549; *supra*, §§ 157, 160; *Fraser v. Jenkinson*, 42 Mich. 206; *Smee v. Smee*, 5 P. D. 84.

See also *Mullins v. Cottrell*, 41 Miss. 291; *Wetter v. Habersham*, 60 Ga. 193; *Hall v. Hall*, 38 Ala. 131; *Jenckes v. Smithfield*, 2 R. I. 255.

² *Smee v. Smee*, 5 P. D. 84.

³ *Leckey v. Cunningham*, 56 Penn. St. 370; *Lewis v. Jones*, 50 Barb. 645.

⁴ *Julke v. Adam*, 1 Redf. 454; *Duffield v. Morris*, 2 Harring. 375; *Peck v. Cary*, 27 N. Y. 9.

⁵ *Black v. Ellis*, 3 Hill (S. C.) 68; *Andress v. Weller*, 3 N. J. Eq. 604. And see *supra*, §§ 127, 128; *Elkinton v. Brick*, 44 N. J. Eq. 154; *Watson's Will* (N. Y.), Am. Dig. 1891.

⁶ *Ross v. McQuiston*, 45 Iowa, 145; *Shailer v. Bumstead*, 99 Mass. 119; *Wright v. Tatham*, 5 Cl. & F. 670; *Dale's Appeal*, 57 Conn. 127.

taint transmitted through one's ancestors, it is not considered impertinent to inquire into the sanity of his immediate progenitors or others of the family not remote.¹ The value of this latter evidence appears to depend upon its immediate connection with the testator's own condition, as shown by medical experts;² and where the malady cannot be traced directly in the blood, but the ancestor was collateral or remote, or his mental disorder by no means coincident with that of the testator, such proof can be of very slight consequence.

While the diseased condition of the testator's body as shown by an autopsy may corroborate the proof of mental derangement deduced from manifestations during life, this should not be relied upon for furnishing the sole or even the primary evidence of the decedent's mental condition.³

§ 193. **Declarations, Letters, etc., of Testator, how far Admissible as to Mental Capacity.**— Upon the question of mental capacity to make a will, declarations of the testator made at or about the time of its execution, and his conduct, are admissible as part of the *res gestæ*.⁴ But his declarations made long after the will was executed, as, for instance, two years, are too remote in time to be admissible on this point.⁵ To letters of the decedent a like principle applies. Such testimony cannot be strained to a remote purpose;⁶ and yet clear, sensible, and perfectly coherent letters written by the testator shortly before and after making the will should bear strongly in favor of his general capacity, if such capacity be at issue.⁷

¹ *Baxter v. Abbott*, 7 Gray, 71; *Snow v. Benton*, 28 Ill. 306.

² 1 Jarm. 38, Am. Ed. Bigelow's note; *Fraser v. Jennison*, 42 Mich. 206. Irrelevant evidence is not on such points admissible. 127 Penn. St. 564.

³ *La Bau v. Vanderbilt*, 3 Redf. 384.

⁴ *Marx v. McGlynn*, 4 Redf. 455; *May v. Bradlee*, 127 Mass. 414; *Boylan v. Meeker*, 28 N. J. L. 274; *Colvin v. Warford*, 20 Md. 357; *McTaggart v. Thompson*, 14 Penn. St. 149; *Gibson v. Gibson*, 20 Mo. 227; *Dickie v. Carter*, 42 Ill. 376; 47 Conn. 450.

⁵ *La Bau v. Vanderbilt*, 3 Redf. 384; *Fraser v. Jennison*, 42 Mich. 206.

⁶ *Fraser v. Jennison*, *supra*.

⁷ *Blakely's Will*, 48 Wis. 294. Letters written to a testator, and traced to his possession, afford of themselves no proof of his capacity unless knowledge or act of the testator with regard to those letters can be shown. *Wright v. Tatham*, 5 Cl. & F. 670; 7 A. & E. 313. And see *McNinch v. Charles*, 2 Rich. 229.

Not only as part of the transaction are the declarations, oral or written, of the alleged testator thus admissible upon an issue of *devisavit vel non* ("will or no will"), but they may be received when the condition of the testator's mind is the point of contention, or it becomes material to show the state of his affections. Thus, the feelings of a testator towards a relative or relatives whom he practically disinherits can be shown in proof.¹ In all such cases, the evidence is properly admitted simply as external manifestations of a testator's mental condition, and not as evidence of the truth or falsity of the facts he states.² For as with deeds, so with wills, the parties making them cannot impeach them by their own parol declarations, prior or subsequent to the execution; and evidence thereof is not admissible upon the issue of validity.³ By making a new instrument or revoking the old one, the power to invalidate is properly exercised if mental capacity remain.

It is obvious that if one cannot lawfully revoke a former will because of his present insanity, his insane declaration as to former mental condition should be utterly worthless as testimony of the fact to impeach it. But mental disturbance may be detected by declarations as surely as by conduct; and hence the declarations of persons charged with insanity are admissible, in a chain of logical connection, to elucidate the mental condition existing when the will in question was executed. But if they have no tendency to show contemporaneous capacity or incapacity, they are inadmissible; and hence the subsequent declarations of a testator, made while of sound mind, are held incompetent to show mental condition at the date of execution.⁴

¹ *Whitman v. Morey*, 63 N. H. 448.

The fact that the testator held certain offices after making a will is not admissible to show his competency, without further proof of how he discharged the duties. *Ray v. Ray*, 98 N. C. 566.

² This seems the general doctrine, although the cases are somewhat in conflict upon this point. See *Gibson v. Gibson*, 20 Mo. 227, and authorities

cited; *Jackson v. Kniffen*, 2 Johns. 31; *Provis v. Reed*, 5 Bing. 435; *Moritz v. Brough*, 16 S. & R. 405; *Canada's Appeal*, 47 Conn. 450; 84 Mo. 587. And see § 243 *post*.

³ *Gibson v. Gibson*, *supra*; *Dickie v. Carter*, 42 Ill. 376.

⁴ *Crocker v. Chase* (Vt.), 1 East. Rep. 755.

See next chapter as to declarations

§ 194. **Miscellaneous Points as to Evidence in Such Cases.** —

Rumors among a testator's neighbors, or general reputation as to whether he was of unsound mind or not, are inadmissible proof in the present connection.¹ And generally on an issue of *devisavit vel non* irrelevant testimony should be excluded.² Long lapse of time, moreover, after the testator's decease tends necessarily to discredit any testimony which bears against the usual presumptions for or against the will.³

As evidence to invalidate or corroborate a will, the age of the testator and his bodily state, his condition and circumstances, his known affections and preferences, and the correspondence or contradiction of the will to these affections, the manner of making the will or codicil, the persons around him at the time, their capacity and credibility, — all such matters under reasonable restraint to the point at issue may properly go to the jury, or to the judge who tries the case.⁴ Business transactions performed by the testator about the time of making his will, have been admitted as evidence, as indicative of his mental capacity.⁵

Evidence is relevant and admissible which tends to show that the will presented is in conflict with the fixed purposes previously expressed by the testator.⁶ On the other hand, it is strong evidence of capacity to make the will, that its provisions are suitable, and made in accordance with determinations previously expressed by the testator while clearly sane.⁷

Finally, as the scope of our observations has already clearly indicated, the will itself, the instrument actually presented for probate, is evidence upon any issue of testa-

of a testator on the point of fraud and undue influence.

¹ Wright v. Tatham, 5 Cl. & F. 670, 735; Townsend v. Pepperell, 99 Mass. 40; Brinkman v. Rueggessick, 71 Mo. 553; Vance v. Ubson, 66 Tex. 476. As to conversations in the testator's presence concerning his mental condition, see 74 Iowa, 352.

² Spence v. Spence, 4 Watts, 165;

Ware v. Ware, 8 Greenl. 42; 127 Penn. St. 564.

³ Chase v. Winans, 59 Md. 475.

⁴ Sutton v. Sutton, 5 Harr. 459.

⁵ Kerr v. Lunsford, 31 W. Va. 659; 64 N. H. 573; 98 N. C. 566.

⁶ Seale v. Chambliss, 35 Ala. 19.

⁷ Couch v. Couch, 7 Ala. 519. And see 152 Mass. 470; Hammond v. Dike, 42 Minn. 273; 76 Tex. 574.

mentary capacity;¹ and this the reader should bear well in mind.

§ 195. **The Same Subject: Declarations of those interested under the Will.** — Declarations made before its execution, by parties who afterwards become legatees under a will, are not admissible against the validity of the will.² But upon the question whether declarations, admissions, or conversations, made by a devisee or legatee in the nature of an admission against his own interest or a confession are competent testimony, the decisions are not uniform; some States permitting such declarations to be shown;³ while in other States the better opinion is that such declarations are inadmissible unless the party making them is the sole beneficiary under the will, for the reason that other devisees or legatees may be injuriously affected by the admission of such testimony.⁴ For the general rule is that one party whose interest is several ought not to be prejudiced by the unauthorized declarations of another. If the declaration made under no solemnity of an oath be matter of opinion rather than of fact, there is all the more reason for excluding it.⁵

§ 196. **Character of the Witnesses who testify as to Capacity.** — As Judge Redfield has well observed, testimony to establish lucid intervals, general insanity, or monomania, ought to possess two characteristics, in addition to truthfulness, that great essential of all testimony: (1) It should come from persons learned and experienced in the whole subject. (2) It should come as far as possible from persons who have had ample opportunity to observe the conduct, habits, and mental peculiarities of the individual whose capacity is at issue, and

¹ *Supra*, § 188.

² *Ames Re*, 51 Iowa, 596.

³ *Ware v. Ware*, 8 Greenl. 42; *Atkins v. Sanger*, 1 Pick. 192. Cf. *Phelps v. Hartwell*, 1 Mass. 71. And see *Beall v. Cunningham*, 1 B. Mon. 399; *Brown v. Moore*, 6 Yerg. 272.

⁴ *Thompson v. Thompson*, 13 Ohio St. 356, and cases cited; *Blakey v.*

Blakey, 33 Ala. 611; *Ames' Will Re*, 51 Iowa, 596; *Benton v. Scott*, 3 Rand. 309; *Clark v. Morrison*, 25 Penn. St. 453; *Forney v. Fennell*, 4 W. Va. 729. See also *How v. Pullman*, 72 N. Y. 269.

⁵ See *Atkins v. Sanger*, 1 Pick. 192; *Dale's Appeal*, 57 Conn. 127, and cases cited.

the development of his malady from its earliest stage; and whose knowledge, if possible, reaches back to a period anterior to the malady.¹ But persons whose testimony is founded upon so ample and skilful experience are rarely to be found; or else being of the family, they have some pecuniary interest either in breaking or upholding the will. The family doctor, if there be one, unbiased and of sound judgment, who made the patient's case his careful study in advance of any controversy, combines these requisites in the highest degree. But such an investigation in court calls commonly for a full detail of the facts bearing upon the testator's sanity from unprofessional witnesses, and the discussion and estimation of those facts before the jury, aided by the opinions of a class of men professionally conversant with insane symptoms, and qualified as experts to impart instruction on such an issue.²

§ 197. **Whether Unprofessional Persons can give their Opinions as to Insanity.**—It is a general principle that witnesses may state facts fully so far as their observation extended, but not give opinions outside the range of their peculiar training and experience. Yet the habit of generalizing upon facts is universal; and within a certain compass every intelligent person's opinion will be found valuable. An illiterate man's judgment of weather phenomena, of crops, of forest animals and their trails, may far surpass a scholar's; but only a scholar can discuss questions pertaining to universal language and history. Learned or unlearned, we are all keen observers of character where we are familiar. As for the issues of testamentary capacity, it requires men of legal training to estimate their legal bearing; and men of medical training in a peculiar direction to detect the finer shades of mental disorder; yet most persons of sense and good feeling deem themselves capable of appreciating whether those of their own family and acquaintance are out of their heads or not. Hence the doubt and uncertainty in our law as to whether ordinary witnesses can give their opinions upon the point of a testator's insanity, even admitting that on subjects where

¹ 1 Redf. Wills, 137.

² *Ib.*

training and skill are needful they cannot. That legal doubt and uncertainty let us briefly investigate.

§ 198. **Subscribing Witnesses, though not Experts, may testify as to Apparent Sanity.** — In the first place, it is universally conceded that the subscribing witnesses to a will, even though not experts nor even familiar with the testator's habits and character, may testify as to his apparent sanity or insanity at the date of their subscription.¹ And by admitting unreservedly the opinions of such persons on this point, the law at once refuses to affirm that none but experts are competent to pronounce upon the broad fact of one's mental soundness or unsoundness. The reason why subscribing witnesses are thus allowed to express an opinion of the testator's sanity is, to use the language of a Massachusetts judge, "because that is one of the facts necessary to the validity of the will, which the law places them around the testator to attest and testify to."²

Yet, as we have already seen, the expression of such an opinion by subscribing witnesses is by no means indispensable in establishing a will; for, even though any or all the witnesses should be dead or beyond the reach of process, or wholly forgetful of the circumstances attending the attestation, or otherwise incapable of aiding a just conclusion in court on the question of sound or unsound mind, this issue might be determined and the will admitted or probate refused

¹ *Brooks v. Barrett*, 7 Pick. 94; *Hastings v. Rider*, 99 Mass. 624; *May v. Bradlee*, 127 Mass. 414; *Cilley v. Cilley*, 34 Me. 162; *Robinson v. Adams*, 62 Me. 369; *Dewitt v. Barley*, 9 N. Y. 371; *Clapp v. Fullerton*, 34 N. Y. 190; *Logan v. McGinnis*, 12 Penn. St. 27; *Duffield v. Morris*, 2 Harring. 375; *Appleby v. Brock*, 76 Mo. 314; *Gibson v. Gibson*, 9 Yerg. 329; *Beaubien v. Cicotte*, 12 Mich. 459; *Brooke v. Townshend*, 7 Gill, 10; *Turner v. Cheesman*, 15 N. J. Eq. 243.

² *Gray, J.* (afterwards Chief-Justice of Massachusetts, and since Associate Justice of the Supreme Court of the

United States), in *Hastings v. Rider*, 99 Mass. 624. The reason is also expressed in a late Missouri case: "Attesting witnesses have always been permitted to express an opinion as to the sanity of the testator, on the ground that the law has made it their duty to inspect the testator's capacity, and the law presumes they did observe and judge of it, while other witnesses were by some authorities permitted to speak only as to facts." *Appleby v. Brook*, 76 Mo. 314. For an application of the Illinois statute on this point, see *Bice v. Hall*, 120 Ill. 597.

without them.¹ And certainly the testimony of subscribing witnesses on this point is by no means conclusive, but may be rebutted by other evidence to the contrary.² For the weight and force to be given to the opinion of any subscribing witness regarding the testator's capacity depends, as in the case of other witnesses, upon the extent of his actual knowledge in this direction and the opportunities afforded for forming his opinion.³ It is true that the subscribing witness may state his belief as to the testator's soundness of mind without first showing the grounds upon which that belief was based;⁴ but all the facts seen or known by him at the time are proper subjects of inquiry by either party, and ought to be elicited whenever there is a controversy.⁵

A subscribing witness who testifies against the capacity of the testator is not only open to disproof by the proponent of the will, but may be impeached by other testimony, tending to discredit his veracity. Merely because one is a subscribing witness, his opinion is entitled to no greater weight than it really deserves.⁶ A subscribing witness's testimony is not unfrequently discredited. And it is held that while such a witness may at the probate give the opinion regarding the testator's sanity which he had at the time of execution, he cannot state an opinion which he has subsequently formed.⁷

¹ See *Cilley v. Cilley*, 34 Me. 162; *supra*, § 175.

² *Cilley v. Cilley*, 34 Me. 163; *Harper v. Harper*, 1 N. Y. Supr. 351; *Orser v. Orser*, 24 N. Y. 51.

³ *Turner v. Cheesman*, 15 N. J. 243; *Harper v. Harper*, 1 N. Y. Supr. 351; *Stevens v. Vancleve*, 4 Wash. C. C. 262.

⁴ *Logan v. McGinnis*, 12 Penn. St. 27; *Robinson v. Adams*, 62 Me. 369.

⁵ *Cilley v. Cilley*, 34 Me. 162. When these facts are elicited, it will often appear that the subscribing witness had very little foundation for an opinion upon the subject. Nevertheless, our courts give every subscribing witness the full benefit of the trust which the maker of the will has obviously placed in him, and refuse to limit his expres-

sion of an opinion by any preliminary inquiry as to whether he had good ground for forming one. "It is the fact of being a witness to the will that gives this right to ask his opinion of the soundness of mind of the testator. It may be given, although the witness was suddenly called in, and heard only the request to sign, and the declaration of its being his last will." *Kent, J., in Robinson v. Adams*, 62 Me. 369.

⁶ *Thornton v. Thornton*, 39 Vt. 122. See *Stirling v. Stirling*, 64 Md. 138.

⁷ *Williams v. Spencer*, 150 Mass. 346. This decision is based upon the peculiar Massachusetts doctrine, detailed in § 199, which restrains the expression of non-expert opinions to the subscribing witnesses.

§ 199. **Whether Other Witnesses, not Experts, may state their Opinions as to Sanity; Unfavorable Decisions.** — Whether other witnesses, who are not experts, may likewise be permitted to state their opinion concerning the testator's sanity is a question upon which our courts do not agree. In Massachusetts, whatever may be the rule elsewhere, it is repeatedly held that the witnesses to the will, the family physician who has been medical adviser of the deceased, and witnesses who are qualified as experts in the knowledge of mental disease, are alone competent in contests of this character to give their opinions in evidence. The testimony of other witnesses is confined to a statement of the facts and declarations, manifesting mental condition, of which they have knowledge.¹ The reasons given for excluding such opinions is that those forming them have no peculiar duty or capacity to do so, that the matter requires special knowledge and skill, which such witnesses have not, that every unskilled witness has a different standard, and that the court or jury can quite as well reach a conclusion from proof of the details of the acts and conduct of the person whose mental capacity is in question.²

Nevertheless, it is conceded by the courts of this State that in eliciting the testimony of witnesses not competent to give an opinion of the testator's mental condition, practical difficulty is found in confining them to material facts and preventing the direct or indirect expression of an opinion. It is not easy for most witnesses to "distinguish between matters of fact and opinion on this subject; between the conduct and traits of character they observe and the impression which that conduct and those traits create."³ Indeed, the latest Massachusetts decisions disclose less confidence than formerly in the propriety of suppressing unprofessional

¹ *Hastings v. Rider*, 99 Mass. 622, and cases cited; *Nash v. Hunt*, 116 Mass. 414; 150 Mass. 346.

² *Hastings v. Rider*, 99 Mass. 622.

³ *Baxter v. Abbott*, 7 Gray, 71, 79; *Ellis v. Ellis*, 133 Mass. 469. For an illustration of this difficulty upon an equivocal question put to a witness, see *May v. Bradlee*, 127 Mass. 414. Here

at the trial a question was put to an unprofessional witness (the guardian of the decedent) which the judge allowed, explaining it to mean, whether the witness ever observed any fact which led him to infer that there was any derangement of intellect. On appeal, there was considered no ground of exception to the question thus put.

opinions on such matters. Thus, upon the issue of a testator's sanity, persons acquainted with him, although neither attesting witnesses nor medical experts, have been allowed to testify whether they noticed any change in his intelligence or any want of coherence in his remarks.¹ And upon some opinions of eminent judges in this State well expressed, the whole subject might be re-opened by assailing the main position that mental soundness in a given case is a condition of which medical men and experts are necessarily better capable of judging upon theory than those personally familiar with the patient upon long and habitual observation of his individual traits and peculiarities;² and recalling, furthermore, that many of the facts and appearances upon which an observer bases his intelligent opinion of insanity cannot be so vividly reproduced by the cleverest of mimics that a jury could pass upon the case with equal facility.

§ 200. **The Same Subject.**—There are a few other States in which the opinions of witnesses who are neither medical men, experts, nor subscribing witnesses, have been ruled out as incompetent where the sanity of the testator is at issue.³

¹ *Barker v. Comins*, 110 Mass. 477. And see *Nash v. Hunt*, 116 Mass. 237, a still later case, in which an unprofessional witness was permitted to say whether he observed "no incoherence of thought in the testator, nor anything unsound or singular in respect to his mental condition." In both these cases the Supreme Court ruled that such inquiries related to facts, not opinions; which only serves to show to what subtle distinctions the Massachusetts doctrine is at last reduced. If testifying thus to the appearance of the testator is not giving the witness's own opinion as the result of his personal observation, it comes certainly very close to it. Judge Redfield takes this view in 1 Redf. Wills, 144, note, citing *Poole v. Richardson*, 3 Mass. 330, where it is said that "other witnesses were allowed to testify to the appearance of

the testator, and to any particular facts from which the state of his mind might be inferred, but not to testify merely their opinion or judgment."

² In *Baxter v. Abbott*, 7 Gray, Thomas, J., expressed himself as disposed, were the question a new one, to allow every witness, on an issue of sanity, to give his opinion, subject to cross-examination upon the reasons upon which it was based, his degree of intelligence, and his means of observation. See also *Commonwealth v. Sturtivant*, 117 Mass. 122, where Endicott, J. (since Secretary of War), in a somewhat different connection, illustrated with copious learning this whole subject of non-expert testimony upon the opinion of insanity.

³ *Boardman v. Woodman*, 47 N. H. 120. And see *State v. Pike*, 49 N. H. 399.

As in Maine,¹ and in Texas.² So until recently in New Hampshire;³ but in that State the courts have at length reversed this rule, impressed with the practical difficulty which attends the separation of fact from opinion where evidence is given touching the mental condition of a deceased person.⁴

In New York the general rule was once announced by a divided court in substantial accord with the Massachusetts doctrine, namely, so as to confine general witnesses to the statement of facts only where the issue of insanity was raised.⁵ But the authority of that case was afterwards shaken;⁶ and it was declared that here, as in other instances where the minute appearances cannot be so perfectly described that a jury may draw a just conclusion from them, opinions drawn from personal observation are admissible in evidence from necessity.⁷ And the rule of that State, as more lately declared, is, that the general witness when examined as to facts within his own knowledge and observation which tend to show the soundness or unsoundness of the testator's mind, may characterize as rational or irrational the acts and declarations to which he testifies, and show the impression they produced upon him; but that, being an observer and not a professional expert, he cannot go beyond his conclusions from the specific facts he discloses, nor express his opinion on the general question whether the mind of the testator was sound or unsound.⁸

¹ *Wyman v. Gould*, 47 Me. 159. But *cf. Robinson v. Adams*, 62 Me. 159.

² *Gehrke v. State*, 13 Tex. 568.

³ *Boardman v. Woodman*, 47 N. H. 120.

⁴ *Hardy v. Merrill*, 56 N. H. 227, which adopts the dissenting opinion of Doe, J., in *State v. Pike*, 49 N. H. 399, where an exhaustive review of the cases on this subject may be found; 64 N. H. 573.

For the Maine rule, see *Halley v. Webster*, 21 Me. 461; *Robinson v. Adams*, 62 Me. 369. See 79 Cal. 382.

⁵ *DeWitt v. Barley*, 9 N. Y. 371. But the lower courts had been tending in the other direction. See s. c., 13 Barb. 550; *Culver v. Haslam*, 7 Barb. 314; 1 Redf. Wills, 144, note.

⁶ *DeWitt v. Barley*, 17 N. Y. 340.

⁷ *Clapp v. Fullerton*, 34 N. Y. 190; *O'Brien v. People*, 36 N. Y. 276; 86 N. Y. 517.

⁸ *Clapp v. Fullerton*, 34 N. Y. 190; *Rider v. Miller*, 86 N. Y. 507. And see *Eddey's Appeal*, 109 Penn. St. 406; 55 Hun, 7.

§ 201. **The Same Subject: Favorable Decisions.**— On the other hand, the great preponderance of our American decisions favors admitting generally the testimony of persons, professional or unprofessional, as to matters of personal observation bearing upon the testator's sanity, without attempting to discriminate closely between facts and opinions. And in most States an unprofessional witness never was, or else is no longer, confined to a recital of facts from which the jury must draw unaided an inference of sanity or insanity, but he may give his opinion touching the testator's sanity as the result of his own observation and familiarity.¹ Why, indeed, the non-expert subscribing witness should be so highly privileged in this respect above the non-expert general witness who knew well the business and social habits of the testator at the time when the will was made, courts fail readily to apprehend.² And comparing together the non-expert witness with his facts and the expert without them, it has well been said that the judgment of a witness founded on actual observation of the capacity, disposition, temper, character, peculiarities of habit, form, features, or handwriting of others, is more than a mere expert opinion. It approaches to knowledge, and in fact is knowledge, so far as the imperfection of human nature will permit knowledge of these things to be acquired, and such knowledge is proper evidence for the jury.³ Nor does it appear essentially different

¹ *Hardy v. Merrill*, 56 N. H. 227, and cases elaborately reviewed; *Dunham's Appeal*, 27 Conn. 192; 4 Conn. 203; *Cram v. Cram*, 33 Vt. 15; 17 Vt. 499; *Rambler v. Tryon*, 7 S. & R. 90; 23 Penn. St. 117; *Pidcock v. Potter*, 68 Penn. St. 342; *Clary v. Clary*, 2 Ired. 78; *Brooke v. Townshend*, 7 Gill, 10; *Weems v. Weems*, 19 Md. 334; *Dennis v. Weekes*, 51 Ga. 24; *Roberts v. Trawick*, 13 Ala. 68; *Stubbs v. Houston*, 33 Ala. 555; *Appleby v. Brock*, 76 Mo. 314; *Beaubien v. Cicotte*, 12 Mich. 499; *Ryman v. Crawford*, 86 Ind. 262; 5 Blackf. 217; *Gibson v. Gibson*, 9 Yerg. 329; *Runyan v. Price*, 15 Ohio St. 1;

Brooks's Estate, 54 Cal. 471; *Severin v. Zack*, 55 Iowa, 28; 1 Wms. Exrs. 347, Perkins's note; *American Bible Society v. Price*, 115 Ill. 623; *Blood's Estate (Vt.)*, Am. Dig. 1890; *Meeker v. Meeker*, 74 Iowa, 352.

² *Clary v. Clary*, 2 Ired. 78, approved in *Appleby v. Brock*, 76 Mo. 314, 317. But it deserves to be said that witnesses present at the very act of execution, whether subscribing witnesses to the will or not, are brought so immediately into contact with the transaction in question, that their opinions ought to be of especial value in such controversies.

³ *Dunham's Appeal*, 27 Conn. 192.

whether one testifies from his own study of the case and the facts he has personally observed and described that the testator appeared an insane person or that the witness believed him such.¹ Persons present when the will was executed and having as good opportunities of observation and as little bias as the subscribing witnesses themselves, afford an instance in point.²

Let us in this connection remark once more, how often the conviction of mental unsoundness is forced upon the familiar observer in a given case by little signs, like a roving eye, a strange tone of the voice, uneasy gestures, something unnatural in the individual that those who know his usual moods perceive quickly but cannot fully detail. So is it, too, with intoxication; how slowly, in many instances, is that condition perceived by strangers in a mixed company, while the searching glance of an anxious friend or kinsman detected, the instant the drinker entered the room, not only that he had been drinking but how drunk he was. What gave the impression it would be hard to say and harder still to reproduce; but the certainty of that impression is not to be shaken. Nature trains us all to observe the lurking expressions, the moods, the habits and disposition of those about us: this is prompted in a degree by the instinct of affection, of self-preservation; and when one we have long watched shows signs of disease, of mental malady, or simply of settled aversion, the mind notes much that cannot be drawn out at a trial by question and answer; but what one asserts of the individual most confidently is, that he was not like himself, and to that opinion one holds firmly. And on the whole it is better that the court should allow such opinions to be stated together with the facts, and test their accuracy by a cross-examination as to the grounds on which they were based, and the character and bias of the witness

¹ See *Poole v. Richardson*, 3 Mass. 330, as to testifying "to the appearance," which courts in other States have considered as yielding all that they contended for on this question. 1 Redf. Wills, 144, note.

² *Brown v. Mitchell*, 75 Tex. 9. A witness gave an opinion upon facts and observation by comparison with the capacity of a child, in 59 Conn. 226.

himself, than to shut out from the jury one of the most important means of eliciting the truth where death necessitates that all evidence upon the issue of mental condition must be of a secondary sort and without a personal inspection.¹

§ 202. **The Same Subject: English Rule.** — It is generally admitted that in the English ecclesiastical courts, as at the civil law, there was no strict exclusion of matters of opinion, where the testimony of unprofessional witnesses was taken upon the question of mental soundness as affecting a will.² But some have assumed that the common law excluded all such testimony;³ while other authorities maintain with good reason to the contrary.⁴

§ 203. **Restrictions where the Opinions of General Witnesses are Admissible.** — But the opinion of one who is neither an expert nor a subscribing witness should not be received except in connection with the facts upon which that opinion is based.⁵ And it seems entirely proper to question this

¹ "It is a matter of daily experience that the opinion of an intelligent and familiar eye-witness is the only satisfactory means of ascertaining mental condition, or disposition, or expression, or any other of those impalpable but important facts upon which men rest in dealing with each other. . . . In many cases the facts which can be described will be very significant to a jury, while there are many facts susceptible of a different interpretation, from which a jury could obtain no light whatever, without the aid of the witness's judgment. The strongest indications of mental weakness or observation often exist in appearances incapable of reproduction." *Beaubien v. Cicotte*, 12 Mich. 459.

The same general idea is well expressed in a recent case, as follows: "The opinion of an intelligent witness having adequate opportunity of observing and judging, is the best testimony which can be adduced; for no mere description of the acts, or words, or tone

of voice, or glance of the eye, or general expression of the face or manner or bearing, of a person whose mental condition is in question, can convey to the jury the same impression or indications of insanity or mental debility, which they will create in the mind of a competent observer." *Appleby v. Brock*, 76 Mo. 314, 318. And see *Cline v. Lindsey*, 110 Ind. 337.

² *Hastings v. Rider*, 99 Mass. 624, *per* Gray, J.; *Wright v. Tatham*, 5 Cl. & Fin. 692.

³ *Ib.*

⁴ *State v. Pike*, 51 N. H. 185, *per* Doe, J. For the liberal rule of the ecclesiastical courts, see *Wright v. Tatham*, 5 Cl. & Fin. 692; 1 Phillim. 84, 122; 2 Phillim. 449.

⁵ "This rule does not require the witnesses to describe what is not susceptible of description, nor to narrate facts enough to enable a jury to form an opinion from these alone. This would be impossible; and, if it could be done, there would be no occasion for any

general witness first as to what he has actually observed for himself concerning the testator's sanity, in order to lay a foundation for excluding or discrediting any opinion he may entertain.¹ For in order to be received in court, or carry weight, the opinion of a non-expert witness must not be derived from what others have witnessed, nor from rumor or hearsay, nor from any hypothetical statement of the case; but it should be founded upon his own actual knowledge and observation of the testator's appearance and conduct, with fair opportunity of judging.²

Neighbors and friends of the testator, as well as those of his own household and family, persons who have long known and dealt with him, and conversed with him before and after the execution of his will, may, under such a rule, be found quite competent to entertain an opinion touching his sanity.³ But the more constant and familiar the acquaintance, the more trustworthy of course is the testimony, all other things being equal. And while the better rule does not prescribe long intimacy as the indispensable condition upon which a general witness may run from fact into opinion in giving his testimony, nor fix the precise *quantum* or character of one's acquaintance with the deceased,—for the court should in such cases be allowed much latitude of discretion, according to the circumstances,—it is undoubtedly true that the mere naked or ill-founded opinion of a general witness, in regard to the testator's sanity, being entirely worthless, is equally

opinion from the witnesses." Campbell, J., in *Beaubien v. Cicotte*, 12 Mich. 459. See 87 N. C. 477.

¹ *Pidcock v. Potter*, 68 Penn. St. 342, states the Pennsylvania rule to be, that a non-professional witness may state his opinion as to the sanity or insanity of the testator, after stating the facts upon which his opinion is founded. And see *Roberts v. Trawick*, 13 Ala. 68, which appears to rule that such opinions are not admissible until the facts upon which they are based are stated, and can then be given only by those whose long and familiar acquaintance with the deceased qualifies them especially to judge of

sanity. But it appears to us fairer to let these opinions come out without any very strict exclusion, and judge of their consequences by the grounds on which they are based.

² *Cram v. Cram*, 33 Vt. 15; *Dunham's Appeal*, 27 Conn. 192; *Hardy v. Merrill*, 56 N. H. 227; *Bell v. McMaster*, 29 Hun. 272; *Beaubien v. Cicotte*, 12 Mich. 499; *Appleby v. Brock*, 76 Mo. 314; *Gibson v. Gibson*, 9 Yerg. 329; *Turner v. Cheesman*, 15 N. J. Eq. 243; *Garrison v. Garrison*, ib. 266; 72 Iowa, 84.

³ See *Ryman v. Crawford*, 86 Ind. 262; 87 N. Y. 514.

inadmissible as evidence.¹ For the impression made upon the mind of an intelligent witness by what he has observed in the conduct, manner, bearing, conversation, and acts of another may be of great help to a jury; but far otherwise the impression produced by hearsay, prejudice, or idle gossip.²

§ 204. **Opinion of Physicians, Attendants, etc.** — The opinion of a physician on the question of a testator's sanity is entitled to great weight, especially if he regularly attended the testator at and about the time when the alleged will was executed.³ Under that principle already discussed, which most States favor, the opinion of any physician grounded upon his own opportunities of observation would be competent evidence, while his professional knowledge gives that opinion far greater force. And so, too, with any skilful nurse or attendant whose narrative of the case, accompanied by the personal impressions received from the patient's acts and behavior, should deserve high consideration.⁴

¹ See *Beaubien v. Cicotte*, 12 Mich. 459; *Morse v. Crawford*, 17 Vt. 502; *Stackhouse v. Houton*, 15 N. J. 202; *Dorsey v. Warfield*, 7 Md. 65; *Brooke v. Townshend*, 7 Gill, 10; *Poole v. Richardson*, 3 Mass. 330; *Harrison v. Rowan*, 3 Wash. C. C. 580. No precise time or character of previous acquaintance can be laid down as a fixed rule; much depends upon the kind and degree of mental malady. *Powell v. State*, 25 Ala. 21. But a personal acquaintance begun with the testator some time after the will was executed, has no positive or direct bearing upon the main issue of capacity. *Eckert v. Flowry*, 43 Penn. St. 46.

Although a direct question of opinion concerning the testator's sanity may be improper, yet from its connection with the witness's prior testimony as to facts and circumstances, its admission may be trivial. 121 Ill. 376.

² Whether a witness, not an expert, is qualified to express an opinion as a conclusion of fact, is for the judge presiding at the trial, or trying himself the

case without a jury, to decide. See 117 Mass. 122.

³ *Cheatham v. Hatcher*, 30 Gratt. 56; *Fairchild v. Bascomb*, 35 Vt. 398; *Baxter v. Abbott*, 7 Gray, 71; *Kempsey v. McGinniss*, 21 Mich. 123; *Duffield v. Morris*, 2 Harring. 385; *Frery v. Gusha*, 59 Vt. 257.

⁴ *Brown v. Riggis*, 94 Ill. 560. In *Fairchild v. Bascomb*, 35 Vt. 398, it seems to be thought that a nurse in regular attendance is qualified to testify as an expert. The remark is a careless one; for no such qualification can be predicated of most nurses. Yet special training and experience might place one on that privileged footing; and schools for nurses are a modern establishment.

The opinion of a Roman Catholic priest and confessor may be given as to the mental condition of a testatrix under his spiritual care, especially if he had made a preliminary examination to test her sanity, and was in the constant habit of applying his studies in physiology and psychology to test the mental condition

§ 205. **The Same Subject: Medical Experts, etc.** — But regarding the physician or psychologist more in the light of an expert than an ordinary witness on the question of insanity, the courts treat him with much deference in testamentary causes. As an expert, one's testimony takes a much wider range; for thus his general belief as to whether the testator was sane or insane may be freely elicited without being confined to the impressions derived from what he personally witnessed; and he may express a professional opinion upon the facts embodied in the testimony of other witnesses without being confined to matters of his personal observation.

Insanity, in modern times, is treated in asylums and by physicians who make a speciality of this malady. Yet the knowledge of facts derived by the physician in an individual case under his professional treatment may be a fair offset to a specialist's knowledge acquired elsewhere. Great respect certainly is paid by our courts to the opinions of all educated practising medical men upon subjects of medical science; for even in Massachusetts, where the opinions of general witnesses have been so sedulously excluded, physicians who neither attended regularly in the case, nor are experts on the subject of insanity, have been allowed to express their opinions of the testator's sanity, from the fact that they were called in professionally.¹ That one's experience was less than another's of the profession is held insufficient ground for ruling them out; the difference being rather in the weight of testimony than the competency of the testimony.²

In general, the courts have refused to distinguish between different members and different schools of the medical profession. And they appear to place educated and practising physicians generally upon the high plane of medical experts in testamentary causes where the issue of mental soundness is raised; drawing no bold line, as it would seem, between specialists on this subject and others of regular standing in

of those who confessed. *Toomes's Estate*, 54 Cal. 509. See 76 Mo. 314.

¹ *Baxter v. Abbott*, 7 Gray, 71; *Hastings v. Rider*, 99 Mass. 622.

² *Baxter v. Abbott*, 7 Gray, 71, *per* Thomas, J.

the profession, but leaving it rather to the good sense of the jury to sift all opinions thus expressed as well as the facts, and to discriminate as circumstances may require.¹ The aid imparted by physicians here extends, therefore, by judicial consent beyond the usual range of opinions or impressions formed as the result of one's actual observation; nor in practice would a professional man treat a case without investigating facts and symptoms related by others, and basing his opinion upon their narrative as tested by his own judgment and personal inspection. Any responsible opinion imports, in truth, wider and deeper reaching for facts than an irresponsible one.²

¹ *Harrison v. Rowan*, 3 Wash. C. C. 580, 587; *Fairchild v. Bascomb*, 35 Vt. 398; *Baxter v. Abbott*, 7 Gray, 71; *Kempsey v. McGinniss*, 21 Mich. 123; *Tullis v. Kidd*, 12 Ala. 650; 1 Wms. Exrs. 347, Am. Ed., Perkins's note; *Livingston v. Commonwealth*, 14 Gratt. 592; *Cheat-ham v. Hatcher*, 30 Gratt. 56; *Duffield v. Morris*, 2 Harring. 385; *Potts v. House*, 6 Ga. 324; *Gibson v. Gibson*, 9 Verg. 29.

Many other cases to which reference is sometimes made under this general head, relate to issues of sanity in criminal cases. See 12 Ohio, 483. But testamentary causes involve peculiar considerations, and our precedents are better drawn from controversies over wills. Insanity in crime involves the question of moral responsibility; and there are late cases which, upon such an issue, consider physicians who have not made the subject of mental disease a special study, incompetent to testify as experts upon a hypothetical case. *Commonwealth v. Rich*, 14 Gray, 335. We do not, however, find any such rigid doctrine applied in testamentary causes, where, as a matter of fact, however, the physicians summoned have usually had some personal experience with the testator's case.

In *Kempsey v. McGinniss*, 21 Mich. 123, 137, the court treated as admissible in evidence, upon the question of mental

soundness, the opinions of several professional witnesses who had not seen the testator during his illness. "We consider it too well settled," observed Christianity, J., "to require the citation of authorities, that, upon questions of this kind, the opinions of men skilled in that particular science, or, in other words, physicians, are admissible in evidence, though not founded upon their own personal observation of the facts of the particular case. But if the question had not already been closed by authority, I should be much inclined to doubt the propriety of receiving the opinions of merely medical witnesses, under such circumstances, to anything more than physical facts, such as the physical effects of the disease; as I think it may well be doubted whether the skill of ordinary physicians in metaphysics, or their judgment upon merely mental manifestations, has been shown by experience to be of any greater value than that of intelligent men in other departments of life. The question, however, seems to be settled in their favor upon authority."

² Upon the testimony of medical men and difference of opinion among them, some just observations are made by Mr. Justice Washington in *Harrison v. Rowan*, 3 Wash. C. C. 587: "A physician may, with some degree of accuracy, form an opinion of the nature of

§ 206. **Expert Testimony Admissible as to Facts observed, or hypothetically.**—The opinion of an expert concerning the sanity or insanity of a testator is generally admissible so long as its grounds are explained, whether as founded upon his own observation and examination of the patient, or upon a hypothetical case involving the facts which the evidence in the case appears to have disclosed, or as the combined result of his own observation and the other testimony adduced at the trial.¹ And his opinion may be based upon a defined portion alone of the testimony, provided the whole testimony is not contradictory, but its truth expressly assured, and the expert is first made acquainted with all of the testimony upon which he is asked to pronounce.²

§ 207. **The Same Subject: Limitations to Such Expert Testimony.**—But while a hypothetical case based upon the facts shown in evidence may thus be submitted to a medical expert for his opinion, it is held that expert opinions as to sanity based on hypothetical facts not appearing to exist in the given case are not admissible;³ and should the jury fail to find certain manifestations testified to as facts, they should reject whatever opinions were based upon them.⁴ Nor does a hypothesis framed from a narrow range of facts offer ground for expert opinions of real value.⁵ It is further held that an expert cannot be allowed to give his opinion based partly

the disorder, and its probable effect upon the mind, where the symptoms are truly stated to him; because, from a long course of experience and observation, by himself and others of the profession, such have been the ordinary effects of these symptoms. But, to entitle such opinions to the regard of a jury, they should be satisfied by the other evidence in the cause that the symptoms did exist in the particular case under consideration. And if the opinions of these professional gentlemen should differ materially, as to the ordinary effects of certain symptoms, the jury must weigh their evidence, as in other cases, and decide according to

the opinion they may form of the comparative judgment, learning, and experience of the witnesses themselves." See also *Kempsey v. McGinniss*, 21 Mich. 123, on this subject.

¹ *Baxter v. Abbott*, 7 Gray, 71; *Heald v. Thing*, 45 Me. 392, and authorities cited; *Kempsey v. McGinniss*, 21 Mich. 123; 121 Ill. 376.

² *Yardley v. Cuthbertson* (Penn.), unpublished.

³ *Ames Re*, 51 Iowa, 596; 49 Iowa, 76.

⁴ *Kempsey v. McGinniss*, 21 Mich. 123.

⁵ *Andrews Re*, 33 N. J. Eq. 514.

upon his own observation and examination of the patient, and partly upon the unsworn representations of others, whose accuracy he has not tested for himself.¹ Nor can he give an opinion which involves, on his part, the weighing of collateral testimony.²

As for medical testimony to facts observed, any physician who gives an opinion based upon his personal experience with the case ought to detail the facts of such experience, as examination or cross-examination may suggest.³ An expert may state, even on his examination in chief, the grounds of the opinion expressed by him and the reasons for it.⁴ And whether the physician or expert testifies to facts and appearances founded upon his own personal observation and acquaintance with the patient or upon a hypothetical case framed from the testimony adduced at the trial, the facts, symptoms, or appearances upon which his opinion is founded ought to be distinctly drawn out, for upon this presentation depends its intrinsic value.⁵ After all, a mere expert opinion touching a question of testamentary capacity is entitled to very little weight in comparison with proof of facts and circumstances founded in personal observation, which carry their own inference.⁶

§ 208. **To what Time Opinion of Witness relates: does not extend to Legal Capacity, etc.**—The opinion of any competent witness as to the testator's sanity should relate, on the whole, to the time of his examination; and as the earlier impressions he may have conceived in this respect have only a secondary bearing upon the case, they should not be drawn

¹ *Wetherbee v. Wetherbee*, 38 Vt. 254; *Heald v. Thing*, 45 Me. 392.

² *Kerr v. Lunsford*, 31 W. Va. 659.

³ *Hastings v. Rider*, 99 Mass. 622; *Gibson v. Gibson*, 9 Yerg. 29; *Kempsey v. McGinniss*, 21 Mich. 123.

⁴ *Collier v. Simpson*, 5 C. & P. 73; *Keith v. Lothrop*, 10 Cush. 453; *Heald v. Thing*, 45 Me. 397.

⁵ *Heald v. Thing*, 45 Me. 392; *Clark v. State*, 12 Ohio, 483; *Gibson v. Gib-*

son, 9 Yerg. 329; *Clary v. Clary*, 2 Ired. 78. But it does not necessarily follow that the opinion of a witness (here a non-professional one) should be excluded because he is unable to state everything upon which it is based; or that it should be totally disregarded because the facts stated may not justify the conclusion. *Stubbs v. Houston*, 33 Ala. 555.

⁶ See *Burley v. McGough*, 115 Ill. 11.

out upon a direct examination.¹ There is, however, a recent Massachusetts case which takes a different view.² Nor should the witness be asked his opinion whether the testator was competent to make a will; for such an inquiry involves matter of law as well as fact, upon which the court may reserve its instructions; but the simpler inquiry relates to mental soundness or unsoundness, with reference, as near as may be, to the particular act or kind of act in dispute, and as the result of personal knowledge and observation.³

§ 209. **The Issue of Sanity is not to be concluded upon Mere Opinions; General Conclusions.**—On the whole, the issue of mental soundness or unsoundness is not to be decided upon the mere opinions of witnesses, however numerous and respectable, but each opinion should be tested by the facts in the case, in order to judge of its probable correctness.⁴ It is not the opinion of witnesses upon which reliance is placed by the triers of the case; but from the premises which supplied the conviction in the minds of the several witnesses, the court or jury, aided by these opinions, and by the maxims of law, must form its own independent conviction and decide accordingly.⁵ Nor is there good ground for saying absolutely that one class of witnesses who testify in the

¹ *Runyan v. Price*, 15 Ohio St. 1. But where the local practice forbids the witness (a general one) to testify upon the point of mental soundness or unsoundness at all, he is only to state facts together with the impression they produced upon him at the time, by way of giving them the additional weight of his conviction. *Clapp v. Fullerton*, 34 N. Y. 190. But *semble* a change of conviction by the time of the trial would be material in proof in such a case.

² *Williams v. Spencer*, 150 Mass. 346, § 198.

³ *Cf. Runyan v. Price*, *ib.*; *Fairchild v. Bascomb*, 35 Vt. 398; *Beaubien v. Cicotte*, 12 Mich. 459; *Wilkinson v. Pearson*, 23 Penn. St. 117. Capacity to make a will, or what in any case shall be the standard of legal capacity, is

always a question of law. The physical or mental condition from which that capacity may be deduced, is a question of fact, which may be shown by evidence of physical or mental manifestations and the opinions of professional witnesses as inferences of fact thereon. There has been some looseness in the courts in permitting opinions to be given upon a testator's capacity, by professional witnesses and others, but that mode of putting the question is objectionable. *Kempsey v. McGinniss*, 21 Mich. 123, *per* Christiancy, J., 143.

⁴ *Turner v. Cheesman*, 15 N. J. Eq. 243.

⁵ *ib.*; *Garrison v. Garrison*, 15 N. J. Eq. 266; *Eddey's Appeal*, 109 Penn. St. 406.

case should be more relied upon than another.¹ True is it that those whose facilities for observation and judgment were the greatest furnish naturally the most valuable assistance; and hence where medical men disagree in their conclusions, the opinion of the attending physician should carry the most weight.² And among laymen no witnesses are so highly favored as the subscribing witnesses; for these were present at the very act, were trusted by the testator to speak for him, and assumed a responsibility in the premises which no one is supposed to esteem too lightly.³ But these considerations, even though existing in full force, may be offset by others, such as bias, the degree of intelligence and skill, character for truth and veracity, strength of memory, soundness of judgment; and all testimony offered in the case, whether for or against the will, should be weighed in the balance and carefully compared.⁴

¹ *Brown v. Riffin*, 94 Ill. 560.

² *Harrison v. Rowan*, 3 Wash. C. C. 587; *Cheatham v. Hatcher*, 30 Gratt. 56; *Kempsey v. McGinniss*, 21 Mich. 123.

³ *Harrison v. Rowan*, *supra*.

⁴ The recent cases which discuss or compare the testimony offered upon the issue of a testator's sanity are very numerous. Among them may be mentioned *Billings's Appeal*, 49 Conn. 456, where testimony required a reading of details.

In *Sutton v. Morgan*, 30 N. J. Eq. 629, the evidence of three out of four disinterested subscribing witnesses to a will, the fourth being dead, was held to outweigh that of ten other witnesses, all of whom were related to the testator either by blood or affinity; the fact also appearing that the testator's attending physician, although subpoenaed by the caveators and present at the trial, was not put upon the stand.

This whole subject of testimony upon the point of mental soundness is clearly and thoughtfully discussed in *Turner v. Cheesman*, 15 N. J. Eq. 243, where six propositions are stated as the result by

way of a summary. 1. The point of time upon which the judgment of the court turns is that of the execution of the instrument; and evidence of the testator's state of mind, before and after, although admissible, will weigh more or less, according to circumstances. 2. The subscribing witnesses, and their opinions and the facts they state, as occurring at the time, are to be particularly regarded by the court. 3. The testimony of the opinion of witnesses, not subscribing, as to the testator's capacity, are to be received as the slightest kind of evidence, except so far as they are based on facts and occurrences which are detailed before the court. 4. The mere fact of a witness subscribing the will does not entitle his opinion to any special weight. 5. If a stranger to the testator, his opinion is of much less weight than that of another witness, who had long been familiar with the character and habits of the testator about the time when the will was executed. 6. The opinion of no witness will command much respect unless fortified by satisfactory observation and reasons. These propositions are

§ 210. **Expert Testimony further considered; Books of Medical Science, etc.** — A few words may be added more generally upon the subject of expert testimony in causes where a testator's mental capacity is at issue, concerning books of medical science or other professional works relating to insanity. The usual rule is that, while such books, if not objected to, may be read in court, either as part of the testimony or in the course of argument, they are liable to mislead, and cannot, upon objection, be read either to court or jury.¹ But in some States the court has discretion to admit or exclude such testimony;² and local legislation explicit on this point may be found.³ There seems no reason, at all events, why a medical expert may not show that his opinion in the case is founded partly upon books; for this holds true of all professional knowledge.⁴ Whether, however, particular books on a given subject are standard ones and trustworthy, or the contrary, is a vital question, not always easy to determine. Reference to other cases rather than other opinions seems less objectionable;⁵ for, to quote Chief-Justice Tindal, "physic

all sound and sensible, and Judge Redfield (1 Redf. Wills, 142, note) pronounces them exceedingly satisfactory.

In *Beaubien v. Cicotte*, 12 Mich. 459, the court lays much stress upon the importance of testimony founded in personal observation, wherever the question relates to a testator's sanity. "If witnesses," it is here observed, "were not compellable to state such facts as are tangible, there would be no means of testing their truthfulness. When they state visible and intelligible appearances and acts, others who had the same means of observation may contradict them, or show significant and explanatory facts in addition; and if their story is fabricated, or if they describe facts having a medical explanation, medical experts may detect falsehood in inconsistent symptoms, or determine how far the symptoms truly given have a scientific bearing."

¹ *M'Naghten's Case*, 10 Cl. & F. 200; 1 Redf. Wills, 146; *Washburn v. Cud-*

dihi, 8 Gray, 430; *Commonwealth v. Sturtivant*, 117 Mass. 122; *Harris v. Panama R.*, 3 Bosw. (N. Y.) 7; *Davis v. State*, 38 Md. 15; *Fowler v. Lewis*, 25 Tex. 380; *Carter v. State*, 2 Ind. 617.

² *Standenmeier v. Williamson*, 29 Ala. 558; *Luning v. State*, 1 Chand. 264; *Melvin v. Easley*, 1 Jones Law, 386.

³ The Iowa code makes books of science and art admissible. *Brodhead v. Wiltse*, 35 Iowa, 429.

⁴ *Collier v. Simpson*, 5 C. & P. 74; *State v. Terrell*, 12 Rich. 321; 1 Redf. Wills, 146.

⁵ An expert, it is held, may refer to other cases in his own experience as illustrative of the case before the court. *Parker v. Johnson*, 25 Ga. 576, 584. But he cannot give his opinion upon the previous opinions of other experts. *Walker v. Fields*, 28 Ga. 237. And in reference to cases not of his own experience but related in books, the question

depends more on practice than law";¹ and the facts which go to establish insanity lie within the range partly of common observation and partly of medical or special experience.² But the fundamental objection to admitting medical works or reports at a trial appears to consist in the circumstance that courts and the legal profession bring no critical knowledge or experience to bear upon their contents, nor have they opportunity to test the authority of the book by putting the writer upon the stand, but must confide altogether in mere expert opinion, and thus open a boundless field for collateral inquiry.

§ 211. **Competency and Value of Expert Opinion.**—The general competency of a person to testify as an expert is for the judge presiding at the trial to determine.³ And to quote from Chief-Justice Shaw, "the value of such testimony will depend mainly upon the experience, fidelity, and impartiality of the witness who gives it";⁴ its design being to aid the judgment of the triers of a case in regard to the influence and effect of certain facts which lie out of the observation and experience of persons in general.⁵ No jury should give more weight to expert opinions, than in deciding the case on the whole testimony they think such opinions fairly merit.⁶

§ 212. **In what Manner Questions should be put to an Expert.**—There is considerable discussion as to the manner in which questions should be put to an expert; but no positive formula can be said to apply exclusively to such testimony. The great practical difficulty is to avoid apparent conclusions of fact where the evidence in the case is complicated or conflicting; while the practical object is to obtain from the witness the instruction he is qualified to impart as clearly and

arises whether they are correctly and fully narrated.

See *Richmond's Appeal*, 59 Conn. 226, where counsel was restrained from reading to the jury from a standard book on wills in course of his argument.

¹ *Collier v. Simpson*, 5 C. & P. 74.

² See *Smith v. Tibbitt*, L. R. 1 P. & D. 354, 398.

³ *Heald v. Thing*, 45 Me. 397; 117 Mass. 122; *Boardman v. Woodman*, 47 N. H. 120; *Clary v. Clary*, 2 Ired. 78.

⁴ *Commonwealth v. Rogers*, 7 Met. 500, 504, 505.

⁵ *Ib.*

⁶ *Watson v. Anderson*, 13 Ala. 202; *Meeker v. Meeker*, 74 Iowa, 352.

naturally as possible. Various forms of questions which have been put forward, not as an exclusive formula, but rather by way of example, should be considered accordingly. "The object of all questions to experts," it is well said, "should be to obtain their opinion as to the matter of skill or science which is in controversy, and at the same time to exclude their opinions as to the effect of the evidence in establishing controverted facts. Questions adapted to this end may be in a great variety of forms. If they require the witness to draw a conclusion of fact, they should be excluded. But where the facts stated are not complicated, and the evidence is not contradictory, and the terms of the question require the witness to assume that the facts stated are true, he is not required to draw a conclusion of fact."¹

§ 213. **General Conclusion as to Expert Testimony.**— Judge Redfield comments with severity upon the conflicting character of testimony which comes from experts; its often one-sided and partisan character; and above all, the tendency of the most mature and well-balanced minds to run into the most incomprehensible theorizing and unfounded dogmatism, from the exclusive devotion of study to one subject, and that of a mysterious and occult character.² This reference is doubtless a general one to cases, civil or criminal, which involve some issue of insanity; and to that sort of testimony, more purely expert, which consists in framing conclusions upon some hypothetical case where the facts were observed by others. So far as testamentary causes are concerned, where the validity of some will offered for probate turns essentially upon the point of a decedent's mental capacity, and leaving out of

¹ Chapman, J., in *Hunt v. Lowell Gas Light Co.*, 8 Allen, 169, 172. See as to one form of putting the question hypothetically, well adapted to cases where the facts are complicated or conflicting, *Woodbury v. Obear*, 7 Gray, 467. Latitude is allowed where the evidence leaves the facts clear. *Hunt v. Lowell Gas Light Co.*, *supra*; *M'Naghten's Case*, 10 Cl. & F. 200; *Commonwealth v. Rogers*, 7 Met. 500; *United States*

v. McGlue, 1 Curt. C. C. 1. Various instances where the question, as put, required the witness to draw a conclusion of fact, are to be found in the reports. *E.g.* *Sills v. Brown*, 9 C. & P. 601. And see *Kempsey v. McGinniss*, 21 Mich. 123; *Crowell v. Kirk*, 3 Dev. (Law) 355; *Fairchild v. Bascomb*, 35 Vt. 398; 1 Redf. Wills, 148-152.

² 1 Redf. Wills, 154.

consideration those whose present insanity may still be submitted to the crucial test of personal inspection, very little reliance, certainly, should be placed in the mere theorizing of experts, as compared with the practical knowledge treasured up by those, professional or unprofessional, who have been familiar with the words, idiosyncrasies, and individual traits of one whose mind must be weighed from memory ; not only for the reason that psychology is a mysterious and occult science, while the minds of different human beings stamp an impression as distinct, though not as distinguishable as their faces, but because, from the very nature of the case, it has become impossible to reproduce distinctly at the trial, before expert or jury, all the facts, the symptoms, the phenomena, upon which expert testimony may be safely based where personal acquaintance was wholly wanting. Particularly must this hold true in those numerous instances where the instrument was drawn up and signed at the last stage of life and in the sick-chamber where the soul wrestled with the body, and the vital currents, mental and physical, turned at feeble and fitful intervals. At such a crisis of life, symptoms and surroundings may have a direct bearing upon the validity of the transaction, far beyond any theoretical consideration whether the testator had or had not the modicum of reason sufficient for the act.

§ 213 a. **Final Observations : Effect of Probate, Costs, etc. —** A court in ruling on questions, such as this chapter has discussed, should be careful neither to mislead a jury, nor to show an undue bias favorable or unfavorable to the will ; and even propositions abstractly correct may be so stated as to have an injurious effect. But a ruling sufficiently favorable to those defeated in the contest is not a proper subject of exception even though it may have been somewhat inaccurate. The final probate of a will establishes the capacity of the testator, and evidence is not admissible to the contrary on other disputes raised in the course of settling the estate.¹

Costs in contesting a will on the ground of incapacity in

¹ Baptist Convention v. Ladd, 59 Vt. 5; Schouler Executors, Part II. c. 2.

the testator have been charged by the court of probate upon the estate, where, notwithstanding upon full proof the will should stand, there were strong justifying circumstances for raising the controversy.¹

¹ Frost *v.* Wheeler, 43 N. J. Eq. 573. evidence whatever tending to show in-
The court may direct a verdict of the capacity in the testator. 44 Ohio St. 59.
jury sustaining the will, if there is no

CHAPTER X.

ERROR, FRAUD, AND UNDUE INFLUENCE.

§ 214. **Error, Fraud, and Undue Influence remain to be considered in Connection with Testamentary Capacity.**— We have sufficiently discussed the subject of testamentary capacity and incapacity, in its more obvious bearings, where legal disability or the *quantum* of intellect indispensable to the transaction demands consideration. But there remain final topics under the same general head, to which our attention should now be directed; not referable, perhaps, with logical exactness, to testamentary capacity, and yet closely associated with that subject, more especially in cases whose evidence shows that the alleged testator was of weak or doubtful mental capacity. Wherever, indeed, the issue *devisavit vel non* is presented for adjudication, other elements, though not necessarily put in controversy, are involved in the ultimate decision, besides that of mental soundness, or sufficiency of intellect. Namely, was this identical instrument in its integrity one upon which that intellect operated with a testamentary purpose, or was it not? and again, did or did not that intellect produce the will in question freely and without fraud or undue external pressure? For if the instrument was not what the alleged testator intended to execute as his will, it should be refused probate; and so, too, if his intellect, though not actually unsound, was used by artifice or force to make the will as some one else had contrived it for him. Let us then consider these final topics under our present head: Error, Fraud, and Undue Influence.

§ 215. **Fundamental Error vitiates a Will; Effect of Partial Errors.**— Of fundamental error in a will, disconnected with fraud practised by others, it is difficult to conceive; and still

more so of a fundamental error, due to the testator's carelessness and fault alone. But such a case is supposable; as where, for instance, two instruments, similar in general appearance, were drawn up, the one a deed or private memorandum, and the other a will, and the testator hastily executed the wrong one; or where two wills were drafted for different persons, and one party signed that which was intended for the other;¹ though it would certainly be strange if under such circumstances witnesses attested, the instrument was filed away, and the error was neither discovered nor rectified before the testator's death. Here would be a palpable error; and if the testator, being illiterate, blind, or very feeble, had depended upon some scrivener, attorney, or attendant in the transaction, the latter would be greatly to blame in the business. We may assume that a palpable and fundamental error like this would defeat the probate. Of course, there might be an instrument presented for probate which was simply a forgery and not a genuine testament at all.²

Partial errors occur more naturally; and here the mistake, if an honest one, would consist usually in some misunderstanding between the testator and his scrivener or attorney, whereby the will as drawn up and executed contained one or more words, clauses, or sentences, which changed essentially certain provisions of the will from what the testator is shown to have intended. Errors of this kind, as where a legatee's name is stated incorrectly, are sometimes so patent from the context as to be easily rectified; but the mistake

¹ The author, since writing the above, finds a recent English case of precisely this description. Two wills, so similar in language and character that one might have read and served for the other, except for one or two words which the court was asked to treat as a mere misdescription, were prepared for two maiden sisters. The testatrix in question executed the will prepared for her sister. The court held that the deceased did not know and approve of the con-

tents of the instrument she executed, and refused probate of it. *Hunt, Goods of*, L. R. 3 P. & D. 250 (1875).

Where a will is executed in duplicate for the testator's convenience, that fact may be shown, and probate will not be permitted so as to give legatees a double advantage. *Hubbard v. Alexander*, L. R. 3 Ch. D. 738. And see *Nosworthy, Goods of*, 4 S. & T. 44.

² See *Kennedy v. Upshaw*, 64 Tex. 411; § 241.

might be a graver and less obvious one, as where a legacy intended for five thousand dollars was written out as for five hundred ; and various essential errors of one description or another might be supposed to result from the scrivener's misapprehension of his instructions. All such essential errors, should they be claimed to exist, require, at all events, to be proved ; and upon this point the counsel's or scrivener's testimony, and the production of his written notes or instructions may, if admissible, be decisive of the real facts. Here, once more, it is conceivable that the testator himself was the sole party in error ; and a comparison of the will with his own draft or his declarations, if admissible, might establish that a slip of the pen, and not his change of purpose at the last moment, produced a will essentially different on its face, in one or more respects, from what he really or perhaps manifestly intended. A partial or corrected probate of the will, as justice and equity may require, is an ideal remedy for this state of things ; and words or clauses unintentionally omitted might thus be supplied, or those intentionally inserted might be stricken out, in order that the will should stand of record as the testator actually intended.

§ 216. **How far Errors may be corrected in the Probate.** — But much difficulty is found as to correcting errors in the probate, where the error was not fundamental, as if the wrong instrument should be executed, but embraces simply some mistake or omission of words or sentences in the instrument as actually executed and witnessed. At the root of this difficulty appears the objection that a written instrument should not be varied or controlled by parol evidence. English courts of ecclesiastical or probate jurisdiction have not in former times limited their functions very closely in this respect ; for here the circumstances surrounding the testamentary act are investigated, in order that the probate tribunal may gather the intentions of the deceased as to what writing or writings shall operate as and compose his will : and, so far as oral or nuncupative wills are permitted, this investigation would take a wide range.

But confining ourselves to wills executed in writing, the English rule has been that parol evidence of the testator's intention is receivable, to explain, not an ambiguity upon the construction, but an ambiguity upon the *factum*; that is to say, as to what writing or writings were actually executed with the testamentary intent. Thus, parol evidence may show that a document duly executed as a will was never intended as such; as where by mistake each of two persons executed the instrument drawn up for the other;¹ or where a paper, which on the face is testamentary, is shown to have been a mere contrivance to effect some collateral object,² or only the authenticated memorandum for some future will.³ It may show that a codicil was intended to republish a will of a different date from that absurdly written in it through mistake, and in general may connect the codicils with their appropriate will and with one another, and thus give all the links of the testamentary chain, in case of doubt, their rightful sequence.

So, too, it is held, prior to 1838, that parol evidence may show whether the testator meant a particular clause to be part of the instrument, or whether it was introduced without his knowledge; and whether the residuary clause or any other passage was accidentally omitted;⁴ by which we understand, either that written papers were interpolated or omitted, or else that by comparison with the draft of the will as intended, or with the testator's own written instructions, the error may be corrected, and not by mere parol evidence of what the testator intended.⁵ Two conditions are to be satisfied in such

¹ Hunt *Re*, L. R. 3 P. & D. 250.

² Lister *v.* Smith, 3 S. & T. 282.

³ Mitchell *v.* Mitchell, 2 Hagg. 74; Castle *v.* Torre, 2 Moore P. C. 133; 1 Wms. Exrs. 354. And see 15 P. D. 109; *post*, §§ 276-279.

⁴ Lord St. Helens *v.* Lady Exeter, 3 Phillim. 461; Coppin *v.* Dillon, 4 Hagg. 361; Thomson, Goods of, L. R. 1 P. & D. 8.

⁵ Blackwood *v.* Damer, 3 Phillim. 458; Fawcett *v.* Jones, 3 Phillim. 450; 1 Wms. Exrs. 356-358, citing cases

supra and others not at present of much value. In Fawcett *v.* Jones, 3 Phillim. 485, former cases are cited, and in this case Sir John Nicholl refused to pass a line which, once passed, would have set all wills at the mercy of parol evidence and introduced, as he said, "a most alarming insecurity into the testamentary dispositions of all personal property." Blackwood *v.* Damer, *supra*, must be considered an extreme case of permitted alteration in the probate.

cases of undue omission or insertion : (1) The existence of some absurdity or ambiguity on the face of the will, suggestive of error, and calling for explanation. (2) Clear and satisfactory proof that the insertion or omission was contrary to the intention of the testator. Subject to these conditions, the court is at liberty, and even bound, to pronounce for the will, not as actually presented, but with the error rectified by omitting or supplying what was needful for giving full effect to the testator's intent.¹

§ 217. **The Same Subject.**—But as to wills made since 1838, Stat. 1 Vict. c. 26, which requires the whole of every testamentary disposition to be in writing, and signed and attested pursuant to the act, operates in England to debar the probate court from correcting omissions or mistakes in such a disposition, by reference to the testator's draft or instructions.² Indeed, that statute changes materially the old testamentary law as formerly administered by the ecclesiastical courts. For under that law, as Lord Penzance has observed, a "testamentary paper needed not to have been signed, provided it was in the testator's writing; and all papers of a testamentary purport, if in his writing, commanded the equal attention of the court, save so far as one, from its date or form, might be manifestly intended to supersede or revoke another, as a will superseding instructions, or a subsequent will revoking a former."³ Since the statute took effect,

¹ 1 Wms. Exrs. 357, and cases cited.

² Wilson, Goods of, 2 Curt. 853; *Guardhouse v. Blackburn*, L. R. 1 P. & D. 109, in which the general rules are stated which ought, since Stat. 1 Vict. c. 26, to govern questions of this kind in probate tribunals; *Harter v. Harter*, L. R. 3 P. & D. 11.

³ *Guardhouse v. Blackburn*, L. R. 1 P. & D. 109, 113. In this case a codicil had been read over to a capable testatrix, and duly executed by her and attested; and the court refused to exclude from probate a clause which the scrivener swore had been inserted by

him through inadvertence, being neither contained in his instructions nor in the draft codicil. Unexecuted instructions, it was here conceded, can no longer constitute the basis of a probate; for no paper, whatever its form, can be admitted which is not executed according to the statute.* And the court went further than this, and declared that a probate tribunal had no longer the power even to strike out part of the contents of a duly executed paper on the ground that, although such portion formed part of the paper when executed, it was inserted or retained by

however, English authority has tended decidedly against converting the modern court of probate into a tribunal of construction, with the peculiar and dangerous duty of shaping a will into conformity with the supposed intentions of the testator, whether by supplying or substituting words and clauses, or perhaps expunging.¹

§ 218. **The Same Subject.** — In this country, the later rule of the new probate tribunals in England appears to prevail rather than the earlier and looser one of the old ecclesiastical courts. For these probate tribunals are more nearly like ours, while the modern Stat. 1 Vict. c. 26, has its American counterpart in almost every State, where local legislation has long imposed peculiar formalities of execution with attestation in wills both of real and personal property. In an American court of probate, parol evidence may doubtless establish that the alleged testator, at the time of signing the instrument, did not understand that it was a will, nor intend the identical writing to operate as such.² Probably, too, the true sequence and connection of will and codicils might be verbally shown where ambiguity existed; or, perhaps, that sheets inadvertently omitted or tacked on did or did not really belong to that which, properly fastened together, constituted the whole instrument upon which signature and attestation were meant to operate. Nuncupative wills, in the rare instances when they are still permitted, follow their own mode of proof. But the limit of correcting alleged mistakes or explaining an ambiguity by adding or changing, seems here to be approached.³ And where one, fully capable and free from undue influence or coercion, executes for his last will a certain instrument as already drawn up, his draft or instructions cannot, we may assume, be resorted to for correcting an alleged mistake of omission or expression with the aid of parol testimony; espe-

mistake or inadvertence. For this would have required the admission of parol evidence; and besides the execution there was proof here that the codicil had been read over to the testatrix before she executed it.

¹ Harter v. Harter, L. R. 3 P. & D.

11; Davy, Goods of, 1 S. & T. 262. But see § 219; Bushnell's Goods, 13 P. D. 7.

² Swett v. Boardman, 1 Mass. 258; Couch v. Eastham, 27 W. Va. 796.

³ See e.g. Lemann v. Bonsall, 1 Add.

389.

cially if the contents being actually made known to him in detail, he may well be presumed to have adopted them. For any one is liable to change what has been drafted for him before he executes; and to allow an instrument to be changed in terms from that which one has executed with all the solemnities by which the law surrounds it, upon loose and untrustworthy oral evidence, is to involve the transaction in lasting uncertainty.¹

Upon such a basis of argument it is held in this country that an instrument cannot be opposed for probate by evidence that the testator did not understand the legal effect of certain provisions, or truly appreciate the proportions in which his property would be thereby distributed.² It follows, moreover, that the omission of the scrivener, in preparing a will which the statute requires to be executed with due formalities under the statute, cannot be supplied by parol proof.³ Even where the will as drawn, states the name of a legatee, but through some mistake in copying it, and not because of the testator's neglect to state the sum intended, the amount of the legacy is left blank, this important omission cannot be supplied in the probate.⁴

Although through some important omission of this kind, the whole scope and bearing of the testamentary provisions, as actually intended, may be materially changed, the mistake, it is held, cannot invalidate the will on that account, and render it inoperative;⁵ for there is no such doctrine of law as requires the testator's intent to be indivisible, or defeats the will *in toto* inasmuch as the testator's intention must fail in part. In general, no mere misconception of fact or law can invalidate a will.⁶

¹ Gifford v. Dyer, 2 R. I. 99; Comstock v. Hadlyme, 8 Conn. 254; Iddings v. Iddings, 7 S. & R. 111; Barker v. Comins, 110 Mass. 477; Boell v. Schwartz, 4 Bradf. Sur. 12; Andress v. Weller, 2 Green Ch. 604.

² Barker v. Comins, 110 Mass. 477. The testator read over the will and had it read to him besides. And see Jones v. Habersham, 63 Ga. 146.

³ Andress v. Weller, 2 Green Ch. 604.

⁴ Comstock v. Hadlyme, 8 Conn. 254.

⁵ Comstock v. Hadlyme, 8 Conn. 254; Salmon v. Stuyvesant, 16 Wend. 321; Hearn v. Ross, 4 Harring. 46; Creely v. Ostrander, 3 Bradf. 107. A will may be in part good and in part bad, partly sustained and partly rejected. Morris v. Stokes, 21 Ga. 552.

⁶ Monroe v. Barclay, 17 Ohio St. 302.

§ 219. **The Same Subject: expunging Something Superfluous.**—But at the present state of the law, English and American, it would appear that on the ground of mistake, something superfluous may be expunged from a will without transgressing the statute which prescribes a formal attestation, although a co-equal right to insert words or reform a sentence is denied. Numerous cases establish that probate of a part only of a properly attested instrument purporting to be a will, may be decreed while the rest is rejected.¹ But for a court of probate to try to find out by extrinsic evidence what sort of a legal provision the testator meant to make, and then by such alterations as shall carry out his intention in different language and with possibly different legal effect from what he intended, remodel the will in form to suit the theory, is certainly a dangerous abuse of discretion.² Once more, where the interpolated words appear by the proof not to have been really made known to the testator, or adopted into the instrument with his assent, there is the more reason for striking them out at the probate.³ And if words may be

¹ *Fawcett v. Jones*, 3 Phillim. 434; *Allen v. McPherson*, 1 H. L. C. 209. And see *Morris v. Stokes*, 21 Ga. 552; *Rhodes v. Rhodes*, 7 App. Cas. 192; § 248 *post*.

² *Harter v. Harter*, L. R. 3 P. & D. 111. See also *Guardhouse v. Blackburn*, L. R. 1 P. & D. 109, where Sir J. P. Wilde (Lord Penzance) lays down certain principles to be observed in cases under the present English Statute of Wills; *Davy, Goods of*, 1 S. & T. 262.

³ In a late English case, where the scrivener inserted by mistake a clause revoking all former wills, etc., the testatrix having really intended that the instrument in question should operate as a mere codicil to a will previously executed, the court expunged the clause; the testimony showing that the instrument had not been read over, and that the testatrix did not know that this clause was introduced. *Oswald, Goods of*, L. R. 3 P. & D. 162. And in *Mor-*

rell v. Morrell, 7 P. D. 68, where it was found that the word "forty" was introduced by mistake before the word "shares" in a bequest without the knowledge or approval of the testator, the court ordered the word struck out. Still later, where in a will the name of one sister was inserted by a mistake of the draftsman for that of the other sister, probate was granted with the repeated name omitted. *Boehm's Goods* (1891), P.

In a very plain case, the English court of probate went so far recently as to grant probate of a will with a word changed. In the draft, which was read over to the testator, a bequest was made to the "Bristol Royal Infirmary." In the engrossed will, which was not read over to him, this bequest was written by mistake to the "British Royal Infirmary." Upon this proof and an affidavit that there was no such institution as this last named, the court ordered probate with the word "Bristol" sub-

thus expunged from the probate, when shown to have been introduced without the testator's knowledge and assent, so may whole clauses,¹ or some signature which was improperly and needlessly added to the attested instrument.²

§ 220. **Equity Jurisdiction to correct Mistakes.**— Courts of equity have general jurisdiction to correct mistakes in a will, as to their effect, when the mistake is apparent on the face of the instrument or can be made out by a due construction of its terms.³ The rights of parties are thus passed upon, where there are several persons of the same name, or some misnomer or misdescription appears in the will.⁴ Independent gifts to strangers may thus be supplied, as well as a series of gifts to children or members of a class.⁵ Blanks, too, are thus supplied by construction, when the testator's intention was apparent; as where, for instance, the word "dollars" was carelessly omitted after the words "fifteen hundred" in stating a legacy,⁶ or the name of an omitted legatee can be inferred from the whole will.⁷

But a court of equity does not in such a case change the probate; it corrects the mistake or supplies the omission in its effect. The court moulds, so to speak, the language of the testator, so as to carry into effect what he obviously intended. It is not the province of a court of equity to reform a will which the statute requires to be executed with certain formalities.⁸ And since the Statute of Frauds, which requires wills

stituted for "British." *Bushnell's Goods*, 13 P. D. 7 (1887).

¹ See opinion in *Morrell v. Morrell*, 7 P. D. 68, and authorities cited; *Duane, Goods of*, 2 S. & T. 23.

² In *Smith's Goods*, 15 P. D. 2 (1889), the signature of the testator's wife, made not with the object of attesting, but merely "to verify contents" was expunged from the probate.

³ 1 Story Eq. Jur. §§ 169-183 and cases cited; *Mellish v. Mellish*, 4 Ves. 45; *Wood v. White*, 32 Me. 340; *Hunt v. White*, 24 Tex. 643; *Jackson v. Payne*, 2 Met. (Ky.) 567.

⁴ *Wood v. White*, 32 Me. 340.

⁵ *Mellor v. Daintree*, 33 Ch. D. 198.

⁶ *Snyder v. Warbasse*, 3 Stockt. Ch. 463.

⁷ 31 Ch. D. 460.

⁸ *Fitzpatrick v. Fitzpatrick*, 36 Iowa, 674. A will cannot be corrected in equity upon the ground of mistake, by striking out the name of one person and substituting that of another inadvertently omitted. *Yates v. Cole*, 1 Jones Eq. 110. Cf. *Whitlock v. Wardwell*, 7 Rich. 453.

to be in writing, parol evidence, or evidence *dehors* the will is not admissible to vary or control the terms of the will, as expressed, but only to correct mistakes apparent on the face of the will, or to explain some latent ambiguity.¹ Under our American system probate courts exercise equity powers to a considerable extent, while the same appellate tribunal serves for both probate and equity matters; and it seems not only highly expedient, but practicable, that all corrections which properly involve a change on the face of the will should be in some way spread upon the probate records, which serve, in modern times, for public information and to perpetuate the proof of wills.

§ 221. **Where Fraud or Force vitiates a Will.** — The general considerations we have stated as to the effect of essential error in vitiating a will, apply where fraud or force appears to have operated; only that justice is always more alert to defeat gifts and bequests brought about by the wrongful imposition of others, who cherish sinister designs, than those which impute mere error to the giver, or to some third party in the affair who was disinterested. If, then, an instrument executed under the wrong impression that it was one's own intended will, was really a different document in terms, artfully supplied by another, with some ulterior purpose in view, it cannot stand; and far more readily ought material words and sentences omitted, changed, or interpolated be rejected from the probate of the will, or vitiate that instrument altogether, whenever fraudulent design, and not a scrivener's innocent mistake, is shown to have produced it. Where suspicion attaches to such a document, no strong presumption arises from its execution; and, although the testator knew and approved the contents of the paper, it may still be refused probate if fraud purposely practised on the testator in obtaining his execution be established in proof.²

¹ *Hunt v. White*, 24 Tex. 643; *Jackson v. Payne*, 2 Met. 567. And see *post*, Part VI., c. 3, as to extrinsic evidence in aid of the construction of wills.

² See observations of Lord Penzance in *Guardhouse v. Blackburn*, L. R. 1 P. & D. 109, 116.

So, too, a will which has been extorted from a testator by force is voidable as well after death by those whose rights would be impaired by its provisions as, during his life-time, by the unwilling testator himself. For, as it was long ago observed, if it can be demonstrated that actual force was used to compel the testator to make the will, there can be no doubt that although all formalities have been complied with, and the party perfectly in his senses, yet such a will can never stand.¹

Our common law makes no classification of persons incapable for want of liberty or free will, as did the civilians, but leaves the court to determine, upon all the circumstances of each particular case, whether or no the testator had the essential *liberum animum testandi*.²

§ 222. **The Same Subject: Importunity and Undue Influence.**—Closely connected with the subject of fraud and force is that of importunity or undue influence; which latter term is now commonly used in the law of wills to denote that more subtle and insidious constraint which takes away free agency by means of the ascendancy gained by the stronger mind over the weaker. Undue influence involves in some degree one or both the elements of fraud and force, though not so distinctly or easily made out, and is usually exerted in originating and shaping the will of some old and feeble person,

¹ Eyre, C. B., in *Mountain v. Ben-net*, 1 Cox, 355. Unless ratified after all constraint was removed.

² 2 Bl. Com. 497; Swinb. pt. 2, § 8; 1 Wms. Exrs. 44; *Jackson v. Kniffen*, 2 Johns. 31.

Where the testator had a fear upon him, as the old books expressed it, it could not be, as it ought, *libera voluntas*. Yet, as Swinburne adds, "it is not every fear, or a vain fear, that will have the effect of annulling the will; but a just fear, that is, such as that indeed without it the testator had not made his testament at all, at least not in that manner. A vain fear is not enough to make a testament void; but it must be such a

fear as the law intends, when it expresses it by a fear that may *cadere in constantem virum*: as the fear of death, or of bodily hurt, or of imprisonment, or of loss of all or most part of one's goods or the like; whereof no certain rule can be delivered, but it is left to the discretion of the judge, who ought not only to consider the quality of the threatenings, but also the persons as well threatening as threatened; in the person threatening, his power and disposition; in the person threatened, the sex, age, courage, pusillanimity, and the like." Swinb. pt. 7, § 2, pl. 7. And see *Godolph*, pt. 3, c. 25, § 8; 1 Wms. Exrs. 44.

not actually incapable, and yet so nearly disabled by sickness or mental infirmity that the pressure exerted has produced a formal testamentary expression inconsistent with the idea of a free and disposing mind.

§ 223. **Equity Jurisdiction of Fraud and Force; Probate Courts decide Such Questions.**—Equity relieves against fraud and force, as well as error, by virtue of its general jurisdiction; but in the present instance an adequate and far more suitable remedy is found by making the issue, like that of mental capacity, at the probate of the will. In some of the earlier cases the court of chancery distinctly asserted a jurisdiction to relieve against fraud in procuring a will;¹ in other cases disclaiming such jurisdiction;² and in still others declaring the party to the fraud a trustee for those prejudiced by it.³ But it became finally settled in England long ago, that equity could not set aside a will of either real or personal property, because a court of law was competent to annul for fraud in the one case, and an ecclesiastical court in the latter.⁴ Modern legislation in that country makes chancery and probate divisions of the same high court of justice, and removes the former distinctions between wills of realty and personalty as to the effect and desirableness of a probate. Objections, therefore, on the ground of fraud and force, should now be taken in the court of probate; and the chancery judges decline still more positively to interfere with the exclusive exercise of a probate jurisdiction.⁵

¹ 1 Wms. Exrs. 45, note, citing 1 Ch. Rep. 123; Prec. Ch. 123; Goss v. Tracy, 1 P. Wms. 287.

² 1 Ch. 236; Archer v. Mosse, 2 Vern. 8.

³ 1 Ch. 22; 1 Vern. 296; Barnesly v. Powel, 1 Ves. Sen. 287.

⁴ Wms. Exrs. 45; Allen v. M'Pherson, 1 H. L. Cas. 191; Meluish v. Milton, 3 Ch. D. 27.

⁵ Probate Court Act of 20 and 21 Vict. c. 77 (1857); Pinney v. Hunt, 6 Ch. D. 98; Barraclough v. Greenhough, L. R. 2 Q. B. 612; 1 Jarm.

Wills, 28. In the recent case of Meluish v. Milton, 3 Ch. D. 27, where a testator had left all to A. B., his wife, and appointed her his sole executrix, and the will was admitted to probate, the heir-at-law filed a bill in equity to have her declared a trustee for him on the ground that she had fraudulently concealed from the testator the fact that she was not his legal wife, but had a former husband living. It was held that chancery had no jurisdiction, but the case came under the exclusive cognizance of the court of probate.

In this country the probate courts of each State are invested with special powers to deal with issues of fraud and force, and to re-open, if necessary, their own decrees, or submit to those of the appellate court, which regulates all matters of chancery or probate. The American rule, therefore, has steadily discountenanced the idea that equity courts should entertain bills for setting aside a will on the ground of fraud, force, or even mistake, inasmuch as the probate registry preserves the public evidence of testamentary succession, and probate courts themselves have all the powers and machinery necessary to give full and adequate relief.¹ In most States probate is conclusive and necessary in wills, whether of real or personal property or of both combined. And probate of a will determines all questions of fraud, force, and undue influence in their procurement, as well as of testamentary capacity.²

But, under English and American law, equity still passes upon the probated will as a court of construction, and determines what, in fact, the instrument as thus spread upon the record shall be taken to mean, as to provisions in controversy; though such questions may now be raised in the probate court, while the estate is in course of settlement, or by virtue of equity powers conferred in these later days by

¹ See *Gaines v. Chew*, 2 How. 619; *Broderick's Will*, 21 Wall. 503; *Townsend v. Townsend*, 4 Coldw. 70; *Lyne v. Guardian*, 1 Mo. 410; *Blue v. Patterson*, 1 Dev. & B. Eq. 457.

² *Clark v. Fisher*, 1 Paige, 176. "Whatever may have been the original ground of this rule," says Mr. Justice Bradley, concerning the refusal of an equity tribunal to take jurisdiction to set aside a will or its probate, "the most satisfactory ground for its continued prevalence is, that the constitution of a succession to a deceased person's estate partakes, in some degree, of the nature of a proceeding *in rem*, in which all persons in the world who have any interest are deemed parties, and are concluded as upon *res adjudicata* by the decision of the court having juris-

diction. The public interest requires that the estates of persons deceased, being deprived of a master, and subject to all manner of claims, should at once devolve to a new and competent ownership; and, consequently, that there should be some convenient jurisdiction and mode of proceeding by which this devolution may be effected with least chance of injustice and fraud; and that the result attained should be firm and perpetual. The courts invested with this jurisdiction should have ample powers both of process and investigation, and sufficient opportunity should be given to check and revise proceedings tainted with mistake, fraud, or illegality." *Broderick's Will*, 21 Wall. 503, 509.

express legislation; and in all such cases, the exercise of a probate and equity supervision by the same appellate court, as modern legislation provides, tends to secure that consistency and harmony of interpretation and enforcement which justice and good sense imperatively demand.¹

§ 224. **General Considerations as to Fraud and Deceit.**—Fraud vitiates a will; it is no less detestable in law, say the old writers, than open force. If, therefore, the testator be circumvented by fraud, the testament is of no more force than though he were constrained by fear.² There is no positive rule to be laid down as to the *quantum* or quality of deceit required to vitiate a will; but the court or triers should judge by all the circumstances, whether it is probable that the deceit took effect upon the testament, considering the character of the latter, and comparing the deceit with the capacity or understanding of the person supposed to be deceived.³

Thus, it is held that when a legacy is given to a person, under a particular character which he has falsely assumed, and which alone can be supposed the motive of the bounty, the law will not permit him to avail himself of it, and therefore he cannot demand his legacy.⁴ But before applying this rule, the court must be satisfied that the assumed character was the motive of the bounty.⁵ Whether such a rule would operate to deprive one of testamentary benefits with whom a testator lived as his wife, on the allegation that she had deceived him, having a former husband still living, must depend upon circumstances; and certainly the character of lawful wife is by no means the sole moving cause of a man's gift to one who has proved his faithful and devoted companion.⁶

¹ See *Gawler v. Standerwick*, 2 Cox, 16; 1 Wms. Exrs. 45; 1 Jarm. Wills, 27; *N. E. Trust Co. v. Eaton*, 140 Mass. 532.

On the other hand, the legal construction of a will is not cognizable by the appellate court when sitting to determine the question of its probate. *Small v. Small*, 4 Greenl. 220.

² Swinb. pt. 7, § 3; 1 Wms. Exrs. 45.

³ Swinb. pt. 7, § 3.

⁴ *Rishton v. Cobb*, 5 My. & Cr. 150.

⁵ *Kennell v. Abbott*, 4 Ves. 802; *Wilkinson v. Joughin*, L. R. 2 Eq. 319.

⁶ See *Meluish v. Milton*, 3 Ch. D. 27, 29. Such questions of fraud as partly or wholly vitiating the will ought to be determined in probate and not chancery, under modern practice. *Ib.*

§ 225. **Fraud, Undue Influence, etc., vitiate when acting upon a Weak though Capable Mind.**—Fraud and imposition, or undue influence, vitiate a will, whenever practised upon a weaker mind to the extent of overpowering and directing it, provided the result be such that others have a right to complain. Such weakness of mind need not, of course, amount to actual incapacity for making any will;¹ though if actually incapable, still less can one's will be established.

The question, it is said, whether a will is the free and voluntary act of the testator, or the result of fraud or of influences unduly operating upon him in consequence of which his will was made subordinate to that of another, depends upon the question, whether he had sufficient intelligence to detect the fraud, or strength of will to resist the influences brought to bear upon him.² There can be no fatally undue influence, unless there is a person incapable of protecting himself, as well as a wrong-doer to be resisted.³ The two grounds of opposition, — (1) that the testator was not of sound and disposing mind; and (2) that the will was procured by fraud, compulsion, or undue influence, — are often so closely connected as to be properly made together at the probate, the issue being determined by the proof adduced at the trial,⁴ although the burden of proof rests differently in the two issues.⁵

§ 226. **Bodily and Mental Condition at the Time of Execution of Great Consequence in the Issue.**—In such an issue, therefore, it is of great consequence to ascertain the mental and physical condition of the testator at and about the time the will in question was executed. What, for example, would be improper influence in a person of feeble health, might not be such in the case of one in robust health.⁶ In fact, controver-

¹ See Lord Donegal's Case, 2 Ves. Sen. 408, by Lord Hardwicke.

² Griffith v. Diffenderffer, 50 Md. 466.

³ Latham v. Udell, 38 Mich. 238.

⁴ The issues of mental unsoundness and undue influence may be embraced in one inquiry of *devisavit vel non*,

where both questions are connected together. Wilson's Appeal, 99 Penn. St. 545.

⁵ See § 239.

⁶ Griffith v. Diffenderffer, 50 Md. 466; Haydock v. Haydock, 33 N. J. Eq. 494.

sies of this kind occur most commonly where the decedent was at the time of executing the instrument in declining health of mind and body, and so detached from his usual surroundings as to be peculiarly exposed to the secret machinations and importunities of some person or persons who, purposely or through favoring opportunity, hedged him about as life and reason ebbed away. And numerous cases might be cited to illustrate how readily a will may be set aside, without much regard to theoretical distinctions of *compos* or *non compos*, wherever it appears that for procuring it a person of at least weak capacity, and nearly, if not altogether out of his mind, was coerced or imposed upon.¹ On the other hand, some have thought that the exercise of undue influence necessarily presupposes weakness of mind in the testator; and, certainly, it matters little how ingenious is the fraud, or how coercive the influence, if there be intelligence enough to detect, and strength enough to resist them.²

§ 227. **Undue Influence defined; Something Sinister is always imputed in the Present Connection.** — Undue influence is defined as that which compels the testator to do that which is against his will, from fear, the desire of peace, or some feeling which he is unable to resist.³ We say that the influence must be undue, in order to vitiate the instrument, because influences of one kind or another surround every rational being, and operate necessarily in determining his course of conduct under every relation of life. Within due and reasonable limits such influence affords no ground of legal objection to his acts. Hence mere passion and prejudice, the influence of peculiar religious or secular training, of personal associations, of opinions, right or wrong, imbibed in the natural course of one's experience and contact with society, cannot be set

¹ Mairs v. Freeman, 3 Redf. 181; 33 Ala. 611; Leverett v. Carlisle, 19 Haydock v. Haydock, 33 N. J. Eq. Ala. 80; 38 Ala. 131; Potts v. House, 6 Ga. 324; Davis v. Calvert, 5 Gill & J. 269; 9 Md. 540; Wittman v. Goodhand, 26 Md. 95; O'Neill v. Farr, 1 Rich. 80; Marshall v. Flinn, 4 Jones

² Colt, J., in Shailer v. Bumstead, 99 Mass. 121.

³ Turner v. Cheesman, 15 N. J. Eq. 243; Gardiner v. Gardiner, 34 N. Y. L. 199. 155; 1 Redf. 249; Blakey v. Blakey,

up as undue to defeat a will, if, indeed, it were possible to gauge the depth of such influences at all.¹ "It is extremely difficult," as Lord Cranworth has observed, "to state in the abstract what acts will constitute undue influence in questions of this nature. It is sufficient to say, that, allowing a fair latitude of construction, they must range themselves under one or other of these heads — coercion or fraud."²

Not even can the circumstance that the influence gained by one individual over another was very great, be treated as undue in our present connection; especially if the person influenced had free opportunity and strength of mind sufficient to select what influences should guide him, and was in the full sense legally and morally a responsible being. "In a popular sense," says Lord Cranworth, "we often speak of a person exercising undue influence over another, when the influence certainly is not of a nature which would invalidate a will. A young man is often led into dissipation by following the example of a companion of riper years, to whom he looks up, and who leads him to consider habits of dissipation as venial, and perhaps even creditable; the companion is then correctly said to exercise an undue influence. But if in these circumstances, the young man, influenced by his regard for the person who has thus led him astray, were to make a will and leave to him everything he possessed, such a will certainly could not be impeached on the ground of undue influence. Nor would the case be altered merely because the companion had urged, or even importuned, the young man so to dispose of his property: provided only, that in making such a will, the young man was really carrying into effect his own intention, formed without either coercion or fraud."³

To suppose, however, instead of this evil influence, selfishly exerted to the exclusion of others who, rightly considered, were equal or greater objects of the testator's bounty,

¹ See *Newton v. Carberry*, 5 Cranch C. C. 632.

² *Boyse v. Rossborough*, 6 H. L. Cas. 6; 3 De G. M. & G. 817. And see Sir James Hannen in *Wingrove v. Wingrove*, 11 P. D. 83.

³ *Boyse v. Rossborough*, 6 H. L. Cas. 6; 3 De G. M. & G. 817. And see Lord Penzance in *Parfitt v. Lawless*, L. R. 2 P. & D. 462.

an ascendancy gained and exerted to reclaim from dissipated habits and for some just and benevolent purpose, this is never likely to invalidate a will, however earnest or powerful. By this we do not intend that justifiable ends are to be sought by unjustifiable means; nor that what one earnestly believed to be a just, benevolent, and unselfish purpose, proves necessarily so when the will is set up for probate. But should an intimate friend, a spiritual adviser, or some member of the testator's household to whom he is strongly attached, earnestly dissuade him from an unjust purpose, urge him not to disinherit those entitled to his bounty, against whom, without good cause, his heart has been locked up, plead and urge him to become reconciled, to forgive, to part from life in charity and peace, — in short, to make what all ought to call a fair and natural will; and this in an unselfish spirit and without seeking some underhand personal advantage, such influence should not be allowed to disturb the will, on any mere suggestion that it was potent in preventing the wrong.¹ In short, the undue influence which vitiates the testament has always something sinister, corrupt, and selfish about it, when properly viewed, however sly and secret in its workings, or varnished over with hypocrisy, and hence is difficult to be traced except in the effect it has produced.

§ 228. **How Undue Influence may be exerted.** — Undue influence may be exerted by physical coercion, by importunity, or by threats of personal harm and duress. But a more common kind of undue influence than this is where the mind and the will of the testator have been overpowered and subjected to the will of another, so that while the testator appeared to execute willingly and intelligently, it was really the will of another, induced by the paramount influence exercised upon a weak or impaired mind. "Such a will," observes the court of appeals in a recent New York case, "may be pro-

¹ Persuasions used by a testator's children to induce a devise to a brother's or sister's children who were poor will not condemn a will. *Harrison's Will*, 1 B. Mon. 351. Nor are considerations addressed to a testator's good feeling, from disinterested and honorable motives, and simply influencing his better judgment, to be deemed "undue." *Tucker v. Field*, 5 Redf. 139. And see *Cornwell v. Riker*, 2 Demarest, 354; *Eastis v. Montgomery* (Ala.), 1891.

cured by working upon the fears or the hopes of a weak-minded person; by artful and cunning contrivances; by constant pressure, persuasion, and effort, so that the mind of the testator is not left free to act intelligently and understandingly."¹ And we may well assume that a pressure of whatever character, whether it acts on the fears or on the hopes of an individual, is, if so exerted as really to overpower the volition, a species of restraint under which no valid will can be made.²

Whatever, indeed, destroys free agency and constrains a person to do what is against his will, and what he would not do if left to himself, is undue influence in testamentary law, whether the control were exercised by physical force, threats, importunity, or any other species of mental or physical coercion.³ And undue influence sufficient to invalidate a will may be exerted without positive fraud,⁴ notwithstanding the elements of fraud and coercion which may mingle together where undue influence is actually exercised. Nor is undue influence dependent on fixed principles or measured by degree or extent; but by its effect in the particular case, and by a comparison of the two minds which antagonize. If found sufficient to destroy the testator's free agency in the transaction at issue, it must be pronounced undue even though slight;⁵ and conversely, where the testator has resisted the pressure successfully, and acted for himself, there is no undue influence which in any positive sense impairs his will.

¹ Earl, J., in *Marx v. McGlynn*, 88 N. Y. 357, 370.

² *Hall v. Hall*, L. R. 1 P. & D. 481; *Haydock v. Haydock*, 33 N. J. Eq. 494.

³ *Haydock v. Haydock*, 33 N. J. Eq. 494; *Layman v. Conrey*, 60 Md. 286.

⁴ *Stewart v. Elliott*, 2 Mackey (D. C.) 307.

⁵ *Haydock v. Haydock*, 33 N. J. Eq. 494.

The elements of fraud or coercion in cases of undue influence must be liberally interpreted. "The conduct of a person in vigorous health towards one feeble in body," observes Lord Cran-

worth, "even though not unsound in mind, may be such as to excite terror and make him execute as his will an instrument which, if he had been free from such influence, he would not have executed. Imaginary terrors may have been created sufficient to deprive him of free agency; a will thus made may possibly be described as obtained by coercion." *Boyse v. Rossborough*, 6 H. L. Cas. 6. And he proceeds to state certain contrivances which might be employed in the course of exercising undue influence, and yet have a fraudulent character.

§ 229. **To invalidate a Will for Fraud, Undue Influence, etc., Testator's Free Agency must be overcome.** — To invalidate, therefore, a will on the ground of fraud, compulsion, or undue influence, such conduct must be of such a character as to destroy the testator's free agency, and substitute for his own another person's will.¹ Thus importunity, in its legal acceptation, here imports such a degree of urgent and incessant soliciting that, under all the circumstances, and considering the testator's condition of mind and body at the time, it should be concluded that he was too weak to resist it, and his disposition could not be deemed the free act of a capable testator.² The undue influence thus exerted amounts at least to a moral coercion, and constrains the testator, through fear, the desire of peace, or some other motive than affection or a sense of duty, to do that which was really against his will.³

On the other hand, mere honest argument of persuasion, earnest solicitation, and such influence as one person may deservedly obtain over another are as a rule insufficient to affect the validity of a will, in the absence of decisive fraud, even though one should by such means procure a disposition in favor of himself or of some one else whose interest he has maintained.⁴ And a will induced by kind offices as well as

¹ *Mountain v. Bennett*, 1 Cox, 355; *Kinleside v. Harrison*, 2 Phillim. 551; *Gardner v. Gardner*, 22 Wend. 526; *Marx v. McGlynn*, 88 N. Y. 357; *Eckert v. Flowry*, 43 Penn. St. 46; *Roe v. Taylor*, 45 Ill. 485; *Morris v. Stokes*, 21 Ga. 552; *Sutton v. Sutton*, 5 Harring. 459; *Duffield v. Morris*, 2 Harring. 375; *McDaniel v. Crosby*, 19 Ark. 533; *Whitman v. Goodhand*, 26 Md. 95; *Layman v. Conrey*, 60 Md. 286; *Haydock v. Haydock*, 33 N. J. Eq. 494; *Blakey v. Blakey*, 33 Ala. 611; *Turner v. Cheesman*, 15 N. J. Eq. 243.

² See *Kinleside v. Harrison*, 2 Phillim. 551, 552, by Sir John Nicholl; *Styles*, 427; *Armstrong v. Huddleston*, 1 Moore P. C. 478; *Clark v. Fisher*, 1 Paige, 171; *Davis v. Calvert*, 5 Gill

& J. 269; *Baldwin v. Parker*, 99 Mass. 84; *Rollwagen v. Rollwagen*, 63 N. Y. 504; *Coit v. Patchen*, 77 N. Y. 394; *Tawney v. Long*, 76 Penn. St. 106; *Bledsoe v. Bledsoe* (Ky.), 1890; *Dale's Appeal*, 57 Conn. 127; *Thompson v. Ish.*, 99 Mo. 160.

³ *Williams v. Goude*, 1 Hagg. 581; *Hall v. Hall*, 38 Ala. 131; *Tawney v. Long*, 76 Penn. St. 106.

⁴ *Swinb.* pt. 2, § 4, pl. 1; *Clapp v. Fullerton*, 34 N. Y. 197; *Sutton v. Sutton*, 5 Harring. 459; *Dean v. Negley*, 41 Penn. St. 312; *Roe v. Taylor*, 45 Ill. 485; *Howe v. Howe*, 99 Mass. 88; *Shailer v. Bumstead*, 99 Mass. 112; *McDaniel v. Crosby*, 19 Ark. 533; 18 Hun, 403; *Hughes v. Murtha*, 32 N. J. Eq. 288; *Miller v. Miller*, 3 S. & R.

fair argument, is not for such reasons to be set aside.¹ The influence of affection and attachment, such as induces the desire to gratify, is not undue in any legal sense.² Nor do fair and flattering speeches, though abundantly proved, vitiate the will, unless coupled with fraud.³ Nor even the fact that the arguments or persuasions of the person seeking a chief benefit by the will were indelicate, indecorous, or improper.⁴ Nor that such a party passively encouraged the testator's angry resentment towards others cut off eventually in his favor.⁵ Nor simply that the person exerting an influence had illicit sexual intercourse with the testatrix.⁶ In all such instances we are to suppose that the testator's free agency is not overcome.

But while any person has the right to fairly persuade a testator to make him his executor or a beneficiary under his will, an unfavorable impression is afforded where the testator is shown to be of weak judgment, the opportunity for undue influence considerable, and the benefit to the persuading party under the will far greater than a testator would naturally bestow.⁷ And wills have been set aside for the importunities or undue pressure of intimate friends or professional or spiritual advisors, who stand with the decedent in peculiar relations of confidence of which they have taken an unfair advantage.⁸

§ 230. **The Same Subject.**—In the absence of fraud or imposition or undue influence of some kind, the court will

267; *Yoe v. McCord*, 74 Ill. 33; *Schofield v. Walker*, 58 Mich. 96; *Trost v. Dinger*, 118 Penn. St. 259; *Robinson v. Stuart*, 73 Tex. 267. To rule to a jury that undue influence is "improper influence" does not express the legal idea. 98 Mo. 433.

¹ *Gleespin's Will*, 26 N. J. Eq. 523; 32 N. J. Eq. 701; *Rogers v. Diamond*, 13 Ark. 474; *Kerr v. Lunsford*, 31 W. Va. 659; 49 Ark. 367.

² *Williams v. Goude*, 1 Hagg. 581; 1 Wms. Exrs. 47.

³ *Swinb.* pt. 7, § 4, pl. 1; 1 Wms. Exrs. 47; *Small v. Small*, 4 Greenl. 220.

⁴ *Newhouse v. Godwin*, 17 Barb. 236; *Tawney v. Long*, 76 Penn. St. 106.

⁵ *Woodward v. James*, 3 Strobb. 44.

⁶ *Farr v. Thompson*, Cheves, 37; 1 Rich. 80; *Roe v. Taylor*, 45 Ill. 485; *Wainwright's Appeal*, 89 Penn. St. 220; *Sunderland v. Hood*, 84 Mo. 293; 82 Ky. 93. But unlawful cohabitation may be evidence of undue influence in connection with other facts. *Wainwright's Appeal*, *supra*; *Main v. Ryder*, 84 Penn. St. 217; *McClure v. McClure*, 86 Tenn. 173; § 236.

⁷ *Walker v. Hunter*, 17 Ga. 364.

⁸ See § 246, *post*, in this chapter.

not speculate as to the probable motives of the testator.¹ Nor is fraud or imposition to be imputed solely on the ground that the testator depended much upon the legatee for the management of his affairs and attendance to his personal wants.² Indeed, lawful influence such as grows out of legitimate or social relations, must be allowed to produce its natural fruits even in wills. The presumption favors a lawful, rather than unlawful, exercise of influence under such circumstances; and the exertion of a natural influence upon the testator can never afford adequate ground of itself for setting a testament aside.³

But fraud or artful contrivance by which others who are innocent suffer wrong may afford good reason for setting aside the will, in such cases, even though no coercive influence should appear. As, for instance, where one relative has produced the disinheritation of another by false representations, and abused peculiar opportunities of access to color as he likes the sick man's disposition.⁴ Or where one dictates in fact the will, the testator being at the time unable to speak, and falsely pretends to interpret the dying person's wishes according to his own.⁵ Or where by false representations as to the contents of an existing will one has induced the testator to make a new one.⁶ In short, the will should be the *bona fide* will of the testator, however induced; from a fraudulent inducement no one should ever, if possible, be suffered to profit to the injury of the innocent; and a will, the offspring of deception, cannot stand, any more than the offspring of constraint.⁷

§ 231. **The Same Subject.**—Secrecy in the execution of the will, if clearly attributable to the mind and wishes of the

¹ Bleecker v. Lynch, 1 Bradf. 458.

² Bleecker v. Lynch, 1 Bradf. 458; Elliott's Will, 2 J. J. Marsh. 340.

³ Small v. Small, 4 Me. 220; Sechrest v. Edwards, 4 Met. (Ky.) 163; Lowe v. Williamson, 2 N. J. Eq. 82; Gilreath v. Gilreath, 4 Jones Eq. 142.

⁴ Dietrick v. Dietrick, 5 S. & R. 207;

6 S. & R. 55; Nussear v. Arnold, 13 S. & R. 323.

⁵ Scribner v. Crane, 2 Paige, 147. And see Lowe v. Williamson, 1 Green Ch. 82; Blanchard v. Nestle, 3 Denio, 37.

⁶ Moore v. Blauvelt, 15 N. J. Eq. 67.

⁷ Florey v. Florey, 24 Ala. 241.

testator, is no badge of fraud.¹ But this and all the circumstances in fact which we have pronounced insufficient of themselves, may from their association with other facts and circumstances of the case become of pregnant consequence upon the issue. Thus flattering speeches, may, if deceitfully employed to direct a mind that has lost its self-direction, render void the will upon which they have operated. And while, as we have seen, neither advice, nor argument, nor honest and moderate intercession or persuasion, unaccompanied by fraud or deceit, would vitiate a will made freely and from conviction, though such a will might not have been made but for such influences,² there may be, as we have also intimated, an overpowering importunity of advice, of argument or intercession, honestly or dishonestly exercised, but on the whole inexcusably, which, in view of the testator's feeble condition so that he could not combat it, may and ought, if proved, to avoid a disposition made in consequence.³ Some of the cases have held that such an influence, to produce so disastrous a result, must have been consciously exercised with a view to the result;⁴ but to a candid mind it can make no difference in favor of the will that the party thus urging it was so carried away by excitement or blinded by selfish motives falsely ascribed, as not to be conscious of the over-pressure he brought so indiscreetly and unfairly to bear upon its execution. And persuasion used *in extremis*, or where the testator is on his death-bed, is of all instances of persuasion the most repulsive to a court of justice.⁵

¹ Coffin v. Coffin, 23 N. Y. 9; § 245; 43 N. J. Eq. 167.

² *Supra*, § 229.

³ See Buchanan, C. J., in Davis v. Calvert, 5 Gill & J. 301; Brown v. Moore, 6 Yerg. 272.

⁴ 1 Wms. Exrs. 47, Perkins's note; Small v. Small, 4 Greenl. 220; Martin v. Teague, 2 Spears, 268.

⁵ Dickinson v. Moss (1790), 4 Burn. 58, cited 1 Wms. Exrs. 47.

Swinburne states an instance of oral will (as wills of personalty were for-

merly allowed to be made) to show that a dying man's answers to questions put by crafty and importunate persons ought not to be received as the free expression of his will in favor of such persons. The monk asked the gentleman if he would give such a manor and lordship to his monastery. The gentleman answered yea. Then, if he would give such and such estates to such and such pious uses. The gentleman answered yea, to them all. The heir-at-law, observing the covetousness

Less undue influence and less fraud are required to procure a will unlawfully from a person of weak and impaired intellect and physical feebleness, than from a person in full mental and bodily vigor.¹

§ 232. **Fraud, Constraint, and Undue Influence relate to the Time of making the Will and its Execution.** — The constraint or fraud or undue influence necessary to set aside a will must be a present restraint, fraud, or undue influence, operating upon the testator's mind in the very act of making the will, and affecting its execution or the dispositions it makes.² Contemporaneous threats have this effect.³ But while threats, violence, or any undue influence exerted in the past, shown as isolated facts, and in no way connected with the testamentary act, cannot be adduced to impeach it, conduct of this sort which bears upon the execution of the instrument in controversy, and is directly and immediately connected with it, though somewhat remote as to the point of occurrence, may aid in avoiding the will upon which it operated.⁴ "The undue influence," it is well observed, "must be an influence exercised in relation to the will itself, not an influence in relation to other matters or transactions. But the principle must not be carried too far."⁵

of the monk, and that all the estate would be given from him, asked the testator if the monk was not a very knave, "who answered yea." And upon the trial "for the reasons above said, it was adjudged no will." Swinb. pt. 2, § 25, pl. 5.

¹ *Reichenbach v. Ruddach*, 127 Penn. St. 564.

² *McMahon v. Ryan*, 20 Penn. St. 329; *Eckert v. Flowry*, 43 Penn. St. 46; 127 Penn. St. 564.

³ *Moore v. Blauvelt*, 15 N. J. Eq. 367.

⁴ *Cf. Davis v. Calvert*, 5 Gill & J. 269, 303, with *McMahon v. Ryan*, and *Eckert v. Flowry*, *supra*; *Chandler v. Ferris*, 1 Harring. 454; *Rutherford v. Morris*, 77 Ill. 397; *Jencks v. Court*

of Probate, 2 R. I. 255. See also *Boyse v. Rossborough*, 6 H. L. Cas. 6; *Ketchum v. Stearns*, 76 Mo. 396.

⁵ Lord Cranworth in *Boyse v. Rossborough*, 6 H. L. Cas. 6. "Where a jury sees that, at and near the time when the will sought to be impeached was executed, the alleged testator was, in other important transactions, so under the influence of the person benefited by the will, that as to them he was not a free agent, but was acting under undue control, the circumstances may be such as fairly to warrant the conclusion, even in the absence of evidence bearing directly on the execution of the will, that in regard to that also the same undue influence was exercised." *Ib.*

§ 233. **Testament need not originate with Testator; but the Will must be his.** — Our testamentary law does not insist that the making a will should originate with the testator; nor is proof to that effect requisite, provided it be shown that the deceased intended the instrument as his own, and completely understood, adopted, and sanctioned whatever disposition was proposed or suggested to him, and embodied in that instrument.¹ But if any part or clause of the will, or the whole instrument, was first suggested to the testator by any other person and adopted by the testator, such adoption must not be the result of his incapacity or weakness of mind, nor of fraud, circumvention, force, or undue influence; and whether it be so, the trier or jury must decide from all the facts and circumstances presented.²

§ 234. **A Will invalidated for Fraud, Undue Influence, etc., fails as to All whose Benefit is procured.** — A will invalidated for fraud, force, or undue influence, fails, not only as to the person exerting it, but as to all for whom a benefit was thereby procured.³

§ 235. **These Maxims applied to Parental and Filial Relation.** — Threats of personal estrangement or non-intercourse, addressed by a child to a dependent parent, or threats of litigation between the children, may thus destroy the parental disposition upon which they operated.⁴ On the other hand, the natural influence acquired by one in the parental or filial

¹ *Constable v. Tufnell*, 4 Hagg. 477; s. c. on appeal, 3 Knapp, 122; *Jones v. Jones*, 14 B. Mon. 464; *Tunison v. Tunison*, 4 Bradf. 138.

² *Davis v. Calvert*, 5 Gill & J. 269. We have already seen that by the latest test applied to mental capacity of a low degree, it is prescribed that the testator shall, at all events, have sufficient active memory to collect in his mind, *without prompting*, the particulars of the alleged transaction. *Delafield v. Parish*, 25 N. Y. 10. The testator, if not originat-

ing the particular will and its provisions, should at least be perfectly capable of doing so. *White's Will*, 121 N. Y. 406.

³ *Davis v. Calvert*, 5 Gill & J. 269.

⁴ *Moore v. Blauvelt*, 15 N. J. Eq. 367. In *Hartman v. Strickler*, 82 Va. 225, a will in a son's favor was set aside, where it appeared that the testator, a feeble old man, lived with him in fear and subjection, and that the son had threatened to whip him and had prevented him from seeing the daughter, to whom he was tenderly attached.

relation may be allowed its just and natural operation, as powerful, beyond that of the most intimate friends.¹

§ 236. **These Maxims applied to the Marital Relation; a Wife's Influence, etc.**—The wife has been treated with a marked indulgence in testamentary cases which involve issues of this kind; out of consideration, as it would appear, to her sex and marital position, which incline her to persuasive, tender, and persistent rather than overruling methods of influence, and to the impression which popularly obtains, moreover, that a true and faithful spouse is not likely to gain more under her husband's will than she really deserves. Hence a wife's pleading, and even her importunity with her husband, seldom avoids a will made under its influence, so long as it may be supposed that the husband weighed what she proposed and deliberated for himself, and that she practised no deception upon him; and, generally speaking, a wife may justly influence the making of her husband's will for her own benefit or that of others, so long as she does not act fraudulently or extort benefits from her husband when he is not in condition to exercise his faculties as a free agent.² The momentous influence which a spouse may wield in this closest and tenderest of all relations cannot be easily impeached as for undue advantage.

Yet each case furnishes its own criterion; for, after all, duress and deception are the sole attributes of neither sex. If, therefore, a man makes a will in his sickness, by the over-importunity of his wife, to the end he may be quiet, this (says Rolle, C. J.) shall be pronounced a will made by constraint and not a good one;³ by which we must, however, understand that his free agency is overcome.⁴ And if the wife's efforts

¹ *Lowe v. Williamson*, 2 N. J. Eq. 82; 412; *Zimmerman v. Zimmerman*, 23 *Gilreath v. Gilreath*, 4 Jones Eq. 42; Penn. St. 375; *Moritz v. Brough*, 16 S. & R. 403; *Rankin v. Rankin*, 61 Mo. 295; *Hughes v. Murtha*, 32 N. J. Eq. 701; *Meeker v. Meeker*, 75 Ill. 260.

² *Mountain v. Bennett*, 1 Cox, 355; *Small v. Small*, 4 Me. 220; *Gardner v. Gardner*, 22 Wend. 526; *Lide v. Lide*, 3 Hacker v. Newborn, Styles, 427.

³ *Hacker v. Newborn*, Styles, 427.
⁴ *Gardner v. Gardner*, 22 Wend. 526; cases *supra*.

were specially directed to procuring a will peculiarly acceptable to herself and prejudicial to others, or a will after her own precise dictation, this should be taken against her, sooner than the mere use of that ascendancy over a husband which one gains by her virtues and devotion, so as to win a reward which he liberally bestows because her pleasure has become the law of his conduct.¹

A mother's influence is not likely to be unwisely exercised as between her own children; but where the claims of step-children conflict with those of her own offspring, her kindred, or herself, undue influence or fraud may be more readily inferred from her suspicious conduct. Upon such an issue it is competent to show that no foundation existed for excluding children of the former wife from participation in their father's estate.² And in mercenary marriages, of which those of old and wealthy men with a second wife furnish numerous examples, whatever shows heartlessness on the wife's part towards either the testator or those justly entitled to share with herself in his bounty, must needs prejudice her case.³

On the other hand, the wife of a later marriage may be found seeking to set aside a will on the ground that her husband's father or the children of a former marriage unduly

¹ *Small v. Small*, 4 Me. 220. And see *Beaubien v. Cicotte*, 12 Mich. 459.

² *Mullen v. Helderman*, 87 N. C. 471.

"As to fraud, if a wife, by falsehood, raises prejudices in the mind of her husband against those who would be the natural objects of his bounty, and by contrivance keeps him from intercourse with his relatives, to the end that these impressions, which she knows he had thus formed to their disadvantage, may never be removed; such contrivance may, perhaps, be equivalent to positive fraud, and may render invalid any will under false impressions thus kept alive." *Boyse v. Rossborough*, 6 H. L. Cas. 6, *per* Lord Cranworth. But his lordship proceeds to admit that it is extremely difficult to state in the abstract what acts will constitute undue influence.

And see *White v. White*, 2 Sw. & Tr. 505.

It is also stated in this case by Lord Cranworth, that the difficulties of defining the point at which influence exerted over a testator's mind becomes so pressing as to be properly described as coercion are greatly enhanced when the question is one between husband and wife. "The relation constituted by marriage," he observes, "is of a nature which makes it as difficult to inquire, as it would be impolitic to permit inquiry, into all which may have passed in the intimate union of affections and interests which it is the paramount purpose of that connection to cherish." *Boyse v. Rossborough*, *supra*.

³ *Harrel v. Harrel*, 1 Duv. 203; *Reynolds v. Adams*, 90 Ill. 134.

influenced the testator against her.¹ Such a complaint, and the complaint of any wife against her husband's will, may involve an inquiry into her conduct and character; for if she was proved unfaithful and undeserving, she would have little but her legal rights left to stand upon, though these in our modern practice would probably be found ample enough. The influence of a lawful wife, we may add, is differently regarded from that of one who has cohabited illegally with the testator; for while one of the latter kind may not be utterly debarred from taking under her paramour's will, the lawful kindred and natural objects of his bounty (especially if children or issue) might nevertheless oppose any will as unduly procured by her influence, which displaces them for her benefit, for the very reason that sexual influence is so pervading and powerful.² The influence of a mistress is more apt to be undue than that of a wife, because its bias is positive in the direction of perverting one's testamentary disposition from the natural legal channels.³ Wills in fine have been set aside for the fraud and deception of the wife.⁴

§ 237. **The Same Subject: a Husband's Influence.**—Undue influence may be more readily predicated of a husband over his wife than of a wife over her husband.⁵ But the wisdom and policy of preserving the confidence of the marriage relation inviolate bear against a suspicious scrutiny in the case of either spouse. A husband's undue influence over his wife's will is rarely established.⁶

¹ Gaither v. Gaither, 20 Ga. 709.

² Dean v. Negley, 41 Penn. St. 312; Kessinger v. Kessinger, 37 Ind. 341; Monroe v. Barclay, 17 Ohio St. 302; Nussear v. Arnold, 13 S. & R. 323. But unlawful cohabitation with the mother of an illegitimate child does not of itself import undue influence in favor of giving a legacy to that child. Rudy v. Ulrich, 69 Penn. St. 177.

That unlawful cohabitation does not of itself vitiate a will, see §§ 22, 229.

³ See McClure v. McClure, 86 Tenn. 174.

⁴ Scribner v. Crane, 2 Paige, 147.

⁵ Marsh v. Tyrrell, 2 Hagg. 84; *supra*, § 60. See Tawney v. Long, 76 Penn. St. 106. That the earlier rule of our law favored the husband's right to his wife's whole personal estate, and regarded the wife's will as generally of no effect without her husband's permission, we have elsewhere seen. *Supra*, § 45.

⁶ See Armstrong v. Armstrong, 63 Wis. 162.

Where a woman left her estate to the man who lived with her as her husband, knowing of his former relations with another woman, but not perhaps that the other woman was his lawful wife, such ignorance on her part was held insufficient for setting her will aside.¹

§ 238. **Fraud, Undue Influence, etc., must have taken Effect ; Natural or Unnatural Will, etc.**—The fraud, force, or undue influence we are considering must not have been practised alone ; it must, besides, have taken effect, misleading or overcoming the testator.² It must have induced the will, or, at least, have affected the provisions of the will in essential particulars ; it must have substituted something fraudulently of which the testator took no intelligent cognizance, or by a sort of duress extorted from him an unwilling disposition, or by some method more insidious, turned the natural current of his interests and affections into some strange and contrary channel. It must have produced, in short, a disposition differing essentially from what the testator would have made if left free to act for himself. Hence it is always a material and often a decisive circumstance, where fraud, force, or undue influence is charged, that the instrument of itself attempts an unjust, partial, and unnatural disposition of the decedent's estate. For if the disposition appear on the whole a just and reasonable one, or even such as the testator would naturally have made, under all the circumstances, with a due perception of the act engaged in, the property possessed, and the fit claimants to his bounty, little remains to urge against the will unless it can be positively shown that the will, notwithstanding, was not that of the alleged testator. No will can be attacked for fraud, force, or undue influence, unless some one is wronged by it ; and no one is wronged, be the disposition fair or unfair, on general principles, unless worse off under the will in question than without it. But a will should be natural ; and by this our law infers not so much

¹ *Donnelly Re*, 68 Iowa, 126.

That a husband's undue influence may vitiate his wife's will, see *supra*, § 60;

Nedby v. Nedby, 11 E. L. & Eq. 106;

Marsh v. Tyrrell, 2 Hagg. 84.

² See *Shailer v. Bumstead*, 99 Mass. 121.

natural in the sense of conformity to our average human nature, as natural because conformable in the concrete, to the nature and disposition of the person who made it.

Whether, then, the will were contested for incapacity or for fraud or undue influence, it is always proper to inquire whether the provisions of the will are just and reasonable, and accord with the state of the testator's family relations, or the contrary; for if they are, that circumstance is decidedly favorable to sustaining the will; while, on the other hand, if it makes an inequitable distribution of the property, or one quite different from what was naturally to be expected, this circumstance tends in the opposite direction.¹ And in our present connection this may involve two inquiries: one, whether the alleged testator while clearly sound and under no constraint cherished essentially different intentions from those expressed in the instrument under consideration; the other and more general one, whether the intentions here expressed are just and natural, taking the sound and free testator as his own criterion. Then, of course, remains the third inquiry whether the party suspected of influence or fraud, derives from this will some undue advantage. Thus, if the provisions of a will executed by some old, feeble, and dependent person should be shown to differ essentially from his previously known intentions or declarations while in full mental vigor, the difference being in favor of those who stood in confidential relations with him, and the will itself grossly unequal, these circumstances would bear strongly against sustaining it.² Gross and unaccountable inequalities in the disposition of a will require in general some satisfactory evidence, that it was the free and deliberate offspring of a rational, self-poised and clearly disposing mind; and when such evidence is wanting, the will should be set aside.³ And the fact that strangers in blood receive the testator's whole property is a suspicious circumstance, if such strangers stood in a position

¹ *Fountain v. Brown*, 38 Ala. 72.

² *Bradf.* 42; *Walker v. Hunter*, 17 Ga.

³ *Thompson's Will*, 13 Phila. 403;

364; *Mitchell's Estate*, 43 Minn. 73.

Wilson's Appeal, 99 Penn. St. 545; *Lee*

⁸ *Harrel v. Harrel*, 1 Duv. 203; *Gay*

v. Dill, 11 Abb. Pr. 214; *Fountain v.*

v. Gillilan, 92 Mo. 250.

Brown, 38 Ala. 72; *Weir v. Fitzgerald*,

where opportunities to dictate the disposition might have been abused.¹ The harmony of the will with the testator's habitual disposition and affections, while physically and mentally sound, is thus eminently worthy of consideration.²

But circumstances vastly important in connection with other facts, may weigh little by themselves; and no suspicion of undue influence, force, or fraud can rest upon simple proof that the last will differed in tenor from the testator's previously declared intentions.³ For what testator may not, and does not, change his intentions? But the force of the fact that there was a change of testamentary intention depends mainly upon its connection with other facts; a change may be rationally or irrationally made; and if it appears on the whole that the will was the free act of a competent testator, the justice or injustice of its provisions, even to the disinheritance of offspring, cannot be alleged to defeat it. In short, if the testator made a change upon reasons satisfactory to himself, it is no ground for setting the will aside, that those reasons would seem inadequate to the court.⁴ Yet, if reasons cannot be shown, and some change, some perversion appears unexplained, while the instrument discloses on its face a manifestly unjust, unnatural, and partial scheme of distribution, and more especially one which favors those having free access to the testator and full opportunity for fraud or overbearing influence, to the exclusion of those who had not, the general repugnance felt by mankind to wills harsh and unnatural may well resolve all final doubts and condemn it.⁵

§ 239. **Burden of Proof, as to Fraud, Force, or Undue Influence.** — The burden of proving fraud or force in the procurement of a will (unlike the simple issue of testamentary capacity⁶), lies upon those who contest the instrument; and

¹ *Cramer v. Crumbaugh*, 3 Md. 491.

² See *Marx v. McGlynn*, 88 N. Y. 357.

³ *Wood v. Bishop*, 1 Demarest, 512.

⁴ *Horn v. Pullman*, 72 N. Y. 269; *Gleespin's Will*, 26 N. J. Eq. 523.

⁵ That unjust wills, procured by the

exertion of an influence not palpably undue, may yet fail readily from these combined circumstances, see *Marshall v. Flinn*, 4 Jones L. 199; *Martin v. Teague*, 2 Spears, 268; *Taylor v. Wilburn*, 20 Mo. 306.

⁶ *Supra*, § 170, etc.



anything which imputes heinous misconduct to a party concerned and interested in its execution ought to be fairly established by a preponderance of proof.¹ As to undue influence, in the usual and less offensive sense, the burden of proving affirmatively that it operated upon the will in question lies still on the party who alleges it, either by direct evidence or proof of circumstances.² In any such case, however, we assume that it has already been proved satisfactorily by the proponents that the will had been duly executed by a person of competent understanding and apparently a free agent.³ "In order to set aside the will of a person of sound mind," observes Lord Cranworth, "it is not sufficient to show that the circumstances attending its execution are consistent with the hypothesis of its having been obtained by undue influence; it must be shown that they are inconsistent with a contrary hypothesis."⁴ And the same holds true where positive fraud or force is the ground of objection.⁵

Hence is it that isolated and disconnected circumstances are not permitted to outweigh the usual presumption of the law that a person of intelligence and capacity who executes a will does so without imposition or undue influence. Thus, the simple fact that the later will modifies an earlier one in favor of one who drew it up is held insufficient to overcome such a presumption.⁶ Or, generally, that the testator's draughtsman or one whose advice was sought by him receives a legacy under the will.⁷ Or that the will itself differs in tenor from former wills of the testator.⁸ Or that legitimate influence was exercised by the party who derives a

¹ *Bird v. Bird*, 2 Hagg. 142; *Hagan v. Yates*, 1 Demarest, 584; *Stoutenburgh v. Hopkins*, 43 N. J. Eq. 577. Conspiracy is not readily suspected. 47 N. J. Eq. 244.

² *Boyse v. Rossborough*, 6 H. L. Cas. 6; *Glover v. Hayden*, 4 Cush. 580; *Tyler v. Gardiner*, 35 N. Y. 559; *Jackson's Will*, 26 Wis. 104; *Webber v. Sullivan*, 58 Iowa, 260; *Rees v. Stillè*, 38 Penn. St. 138; 1 Con. (N. Y.) 373; *Richmond's Appeal*, 59 Conn. 226.

³ See preceding chapter; *Baldwin v. Parker*, 99 Mass. 79.

⁴ *Boyse v. Rossborough*, 6 H. L. Cas. 6.

⁵ See *Marx v. McGlynn*, 88 N. Y. 357; *Fritts v. Denemberger*, 12 N. J. Eq. 129; *Brown v. Mitchell*, 75 Tex. 9. Local statutes bear sometimes upon such controversies. 54 Conn. 119.

⁶ *Booth v. Kitchen*, 3 Redf. 52.

⁷ *Post v. Mason*, 91 N. Y. 539; *Wilson v. Mitchell*, 101 Penn. St. 495. But see § 245, *post*.

⁸ *Wood v. Bishop*, 1 Demarest, 512.

benefit.¹ Or that peculiar opportunities for secretly directing the testator existed.² For undue influence must be not only alleged but proven.³ As for forgery, undue influence, and fraud, in obtaining the testator's signature to a different instrument from that which he intended to sign, these are offences too grave to be lightly inferred from circumstances which are capable of an innocent construction.⁴ And if the provisions of the will are natural and consistent with the testator's understood wishes, and all the more where those charged with exerting undue influence derive no advantage from the will, the strongest proof of misconduct should be required.⁵

Even the will of a very feeble and aged testator may be upheld against circumstances justly creating suspicion, if the jury upon the whole evidence believe him to have been capable, and are not satisfied that fraud or undue influence induced the execution of the instrument.⁶ And a long lapse of time intervening between the date of execution and the testator's death, during which the testator was relieved of the constraint and might have revoked the will had he chosen, must strengthen the case in favor of its establishment.⁷

¹ See § 229.

² Dale's Appeal, 57 Conn. 127; 25 Neb. 535.

³ Coffman v. Hedrick, 32 W. Va. 119.

⁴ Hagan v. Yates, 1 Demarest, 584; 47 N. J. Eq. 44.

⁵ *Supra*, § 227.

⁶ See Wilson v. Mitchell, 101 Penn. St. 495.

⁷ See Wilson v. Moran, 3 Bradf. 172; Shailer v. Bumstead, 99 Mass. 125; Lamb v. Girtman, 26 Geo. 625; O'Neill v. Farr, 1 Rich. 80; 31 Ala. 59.

Neither general bad treatment nor general kindness will of itself establish undue influence. Tawney v. Long, 76 Penn. St. 106. Nor will motive and opportunity alone. 7 Oreg. 42. Nor merely suspicious circumstances. 26 N. J. Eq. 523. And see 3 Redf. (N. Y.)

52, 181, 384; Thompson v. Davitte, 59 Ga. 472; Layman v. Conrey, 60 Md. 286; Andrews *Re*, 33 N. J. Eq. 514; 33 N. J. Eq. 239. One may reasonably prefer the relative who has taken care of him in his last years above those who have not. McCoy v. McCoy, 4 Redf. 54; Kise v. Heath, 33 N. J. Eq. 239. Or be persuaded to reward services of friend or relative by a legacy. 13 Phil. 302. But unreasonable changes of disposition, especially in superseding the natural objects of bounty in favor of others who give casual attention, where no relative is at hand, raise a suspicion. Van Kleeck v. Phipps, 4 Redf. 99. And if mental incapacity be shown, it is immaterial whether undue influence was exercised or not; for the will is sufficiently vitiated.

§ 240. **The Same Subject: Evidence in Point freely admitted.**—But circumstances, slight of themselves, may, in connection with other facts, prove strong enough to turn the scale against the alleged will. Where the issues raised are fraud and undue influence, any evidence, however slight, tending to prove those issues, is freely admitted.¹ Suspicion may at once rest upon the will in controversy, from the facts brought out as to the testator's soundness of mind; and where some feeble and decrepit or dying person, whose reason totters in its seat, appears to have been brought under a strong or exclusive influence to make an unfair will such as he was not likely to have made at his own instance, combined circumstances adverse to probate, like these, become of so great consequence, that the burden shifts easily upon those who set up the instrument and have, after all, the general onus of sustaining it.²

Indeed, there appears at times a conflict in the cases, concerning this burden of proof, so that evidence which in one instance may be thought plainly inadequate for shifting the burden upon the propounder of the will, puts him in another to repelling the unfavorable imputation which mere circumstances afford. This discrepancy is best met, first by conceding freely that all maxims for balancing the proof of fraud, force, or undue influence, must be sensitive and variable; and next, by pointing out that the burden of impeaching a will on such grounds rests far more positively upon a contestant where the fraud, force, or undue influence in question is made a distinct issue, there being no doubt that the testator was rational, intelligent, and capable, than in those cases far more common, where issues of insanity or incapacity are closely blended with these darker ones, and the proof tends to setting aside the will on either ground. For here the line is not easily drawn nor the burden easily fastened.³

¹ *Beaubien v. Cicotte*, 12 Mich. 459; 238; *Harvey v. Sullens*, 46 Mo. 147; *Clark v. Stansbury*, 49 Md. 346. See *Ray v. Ray*, 98 N. C. 566.
Thornton v. Thornton, 39 Vt. 122.

² See *Marx v. McGlynn*, 88 N. Y. Mass. 79, makes some sensible remarks upon this point, and cautiously concludes as follows: "But where the issue

§ 241. **Proof of Fraud, Forgery, etc.**—Fraud will vitiate a will. And such fraud, it is held, need not be proved by direct and positive testimony; but any facts, however slight, bearing at all upon the point, and not wholly irrelevant, may be admitted, provided that they are strong enough, when combined, to satisfy the jury of the existence and operation of the fraud.¹

Parol evidence is admissible both to prove or to counteract proof of a fraud, notwithstanding the will itself must be in writing; for the purpose in such a case is not to vary or control what is written, but to impeach the validity of the instrument itself. Hence oral proof may establish that one will was surreptitiously obtruded for another, and that the testator executed it ignorantly;² or it may rebut a charge of this nature.³ But a testator's own declarations to prove that a will apparently regular was forged, or that he was fraudulently induced to execute it under the belief that it was some other paper, are hearsay and inadmissible.⁴

§ 242. **Character of the Evidence to establish Fraud or Undue Influence.**—Issues relating to fraud, force, or undue influence, and especially the last, are generally determined upon circumstantial evidence, and inferences drawn from a full presentation of facts inconclusive when taken separately. Hence the wide range of inquiry permitted, in cases of this description, so as to set before the jury or trier of the issue whatever bears upon the preparation of the will. While the point of inquiry concerns the testator's condition, and the external influences brought to bear upon him at the time the

of undue influence is a separate and distinct issue, involving proof that the testator, though of sound mind, and intending that the instrument which he executes with all the legal formalities shall take effect as his will, was induced to execute it by the controlling power of another, we think the weight of authority and the best reason are in favor of imposing upon the party who alleges the undue influence the burden of proving it."

¹ *Davis v. Calvert*, 5 Gill & J. 269; *Tucker v. Calvert*, 6 Call. 90; *Budlong's Will*, 126 N. Y. 423.

² *Doe v. Allen*, 8 T. R. 147.

³ *Doe v. Hardy*, 1 Moo. & R. 525.

⁴ *Boylan v. Meeker*, 4 Dutch, 274. See § 243, *post*. On the question whether a certain instrument offered for probate is forged or genuine, evidence of contemporary matters tending to show a motive for forgery is admissible; *Kennedy v. Upshaw*, 64 Tex. 411.

alleged will was made, the character of those influences may invite much study of their motives, their origin, and growth, and a comparison of counteracting forces in order justly to estimate their probable effect; and as for a testator's condition, his entire moral and intellectual development is more or less involved in the issue. "All that is peculiar in temperament or modes of thought," observes a careful judge, "the idiosyncrasies of the man, so far as susceptibility is thereby shown, present proper considerations for the jury. They must be satisfied by a comparison of the will, in all its provisions, and under all the exterior influences which were brought to bear upon its execution, with the maker of it as he then was, that such a will could not be the result of the free and uncontrolled action of such a man so operated upon, before they can by their verdict invalidate it."¹

So, too, is it admissible to prove that former wills or former testamentary plans embodied a different purpose, as tending to show whether or not the testator has understandingly and of his own free will changed his settled plans in favor of the present arrangement; while the justice or injustice of that arrangement, the natural or unnatural character of the will offered for probate, may open a wide inquiry into family circumstances; for evidence tending to show the relation of a testator to the natural objects of his bounty, the feelings he entertained towards them, and their pecuniary condition, bears upon the issue of undue influence as well as of capacity.²

In establishing the charge of fraud or undue influence, it is further observed that "two points must be sustained:

¹ Colt, J., in *Shailer v. Bumstead*, 99 Mass. 121. And see *Lucas v. Parsons*, 27 Ga. 593; *Jackson v. Kniffen*, 2 Johns. 31; *Reynolds v. Adams*, 90 Ill. 134; *Pierce v. Pierce*, 38 Mich. 412; *Carpenter v. Hatch*, 64 N. H. 573. The inference of fraud from the facts is for the jury, and not a conclusion of law to be drawn by the court. *Horah v. Knox*, 87 N. C. 483.

² *Beaubien v. Cicotte*, 12 Mich. 459; *Campbell v. Carnahan* (Ark.), 1890;

Staser v. Hogan, 120 Ind. 207; *Me-lanefy v. Morrison*, 152 Mass. 473; *Crocker v. Chase* (Vt.), 1 East. Rep. 755. Evidence showing through what line of relatives, or from what sources, the fortune bequeathed was derived, or favors received, may have a bearing upon the natural or unnatural character of the disposition. *Glover v. Hayden*, 4 Cush. 580; *Patterson v. Patterson*, 6 S. & R. 55.

first, the fact of the deception practised or the influence exercised ; and next, that this fraud and influence were effectual in producing the alleged result, misleading or overcoming the party in this particular act. The evidence under the first branch embraces all those exterior acts and declarations of others used and contrived to defraud or control the testator ; and under the last, includes all that may tend to show that the testator was of that peculiar mental structure, was possessed of those intrinsic or accidental qualities, was subject to such passion or prejudice, of such perverse or feeble will, or so mentally infirm in any respect, as to render it probable that the efforts used were successful in producing in the will offered the combined result. The purpose of the evidence in this direction is to establish that liability of the testator to be easily affected by fraud or undue influence which constitutes the necessary counterpart and complement of the other facts to be proved. Without such proof, the issue can seldom, if ever, be maintained.”¹ Experience shows that direct proof of undue influence or fraud is rarely attainable ; but inference from circumstances must determine it ; at the same time, facts and circumstances adduced ought to lead, justly and reasonably, to the unfavorable conclusion, in order to defeat the will.²

§ 243. **The Same Subject: Declarations of the Alleged Testator.** — Many decisions, not altogether harmonious, relate to the testator’s declarations in issues of the present kind. The general rule is, that a testator’s previous declarations are

¹ Colt, J., in *Shailer v. Bumstead*, 99 Mass. 121. See also *Dietrick v. Dietrick*, 5 S. & R. 207; *Potter v. Baldwin*, 133 Mass. 427; 17 W. Va. 683; 35 N. J. Eq. 120, 446.

² See *Saunders’s Appeal*, 54 Conn. 108.

“Undue influence is generally proved by a number of facts, each one of which standing alone may be of little weight, but taken collectively may satisfy a rational mind of its existence.” Stone, J., in *Moore v. McDonald*, 68 Md. 321,

339. And it is further observed in this sensible opinion, that if the facts proved are such that a rational mind might in reason and fairness draw from them the conclusion sought, it is the duty of the court (where appeal is made from the judge of probate who tries in the first instance) to submit the case to the jury; their province being to decide the existence of undue influence at the time of the execution of a will, like any other question of fact. *Ib.*

admissible within a liberal range for the purpose of throwing light upon his mental condition, his exposure to constraint or fraud, and the surrounding circumstances of the testamentary act. As, for instance, his statements that he disliked or feared the person whose coercion is imputed in the case, that he was not master in his own house, that he had to submit in his course of life, or else there would be trouble,—and the like.¹ So, too, in connection with other proof of fraud or undue influence, are one's declarations made at different times, and at distant intervals, down to the making of the will, which disclose a long-cherished purpose of disposing of his estate quite differently from what the will provides as propounded;² or statements showing dislike or affection for the natural objects of his bounty or for those favored in the alleged will.³ A testator's previous declarations are likewise admissible in support of the will which is impeached, as showing a long-cherished purpose on his part to make a testamentary disposition like that in controversy, or in other respects rebutting the idea of fraud or undue influence.⁴

By the weight of authority a testator's subsequent declarations are admissible when they denote the mental fact at the date of execution which is to be proved, or are close enough in point of time to make part of the *res gestæ*; or where they repel the favorable inference naturally arising from the fact that an ambulatory instrument remains unrevoked after the alleged fraud or coercion has ceased to operate; or where they tend to show that the state of mind, or the feelings, opinions, peculiarities of character, existing when the alleged will was made, continued to operate, so as all the more to discredit the instrument set up as apparently the formal and deliberate expression of his will at the period in

¹ *Beaubien v. Cicotte*, 12 Mich. 459.
Cf. *Bunyard v. McElroy*, 21 Ala. 311.

² *Wooton v. Redd*, 12 Gratt. 196;
Denison's Appeal, 29 Conn. 399; *Neel v. Potter*, 40 Penn. St. 483; *Dye v. Young*, 55 Iowa, 433; *Moore v. McDonald*, 68 Md. 321.

³ *Shallcross v. Palmer*, 16 Q. B. 751;

Shailer v. Bumstead, 90 Mass. 112;
Waterman v. Whitney, 1 Kern. 157;
Robinson v. Adams, 62 Me. 369; *Beaubien v. Cicotte*, 12 Mich. 459; *Whitman v. Morey*, 63 N. H. 448; 64 N. H. 573.

⁴ *Roberts v. Trawick*, 17 Ala. 55;
O'Neil v. Murray, 4 Bradf. 311; *Gardner v. Frieze*, 16 R. I. 640.

question.¹ Declarations made long after the will are not, it is true, permitted by the best authorities to show by way of narrative or independently as facts, that fraud or undue influence was practised at the former and essential date of execution;² for this would be to contradict by hearsay evidence, after one's death, what the solemn instrument in writing, unrevoked and witnessed, declares was his intention while living; and it is scarcely possible that a foundation for impeaching the will, should it deserve at all to fail, cannot be better laid than upon such weak and treacherous testimony.³ Such declarations are not, however, to be rejected, if admissible on other grounds like those we have indicated, and where a foundation has already been laid for bringing them in to corroborate better proof bearing upon the main issue; and it remains for the presiding judge carefully to point out how far these declarations must be rejected or received as evidence by the jury.⁴ Declarations made at any distance of time after the will was executed are all the less pertinent to show fraud and undue influence, where the will itself has remained in the testator's possession and control uncanceled;⁵ and mere declarations, whether previous or subsequent to the will, amount of themselves to very little in the face of a *prima facie* showing that the testator was a thoroughly competent person, enjoying normal health, and under no apparent coercion or stress of error when he executed the

¹ Comstock v. Hadlyme, 8 Conn. 254; Robinson v. Hutchinson, 26 Vt. 38; Waterman v. Whitney, 1 Kern. 157; Howell v. Barden, 3 Dev. L. 442; Richardson v. Richardson, 35 Vt. 238; Griffith v. Diffenderffer, 50 Md. 466; Potter v. Baldwin, 133 Mass. 427; Stephenson v. Stephenson, 62 Iowa, 163; Reynolds v. Adams, 90 Ill. 134; 66 Iowa, 754.

² Smith v. Fenner, 1 Gall. 170; Runkle v. Gates, 11 Ind. 95; Jackson v. Kniffen, 2 Johns. 31; Thompson v. Updegraff, 3 W. Va. 629; Vance v. Vance, 74 Ind. 370; La Bau v. Vanderbilt, 3 Redf. 384; Vanvalkenberg

v. Valvankenberg, 90 Ind. 433; 36 N. J. Eq. 259, 603; 4 Dutch. 274.

³ Obtained, as such hearsay declarations may be, by deception or undue influence, and always liable to the infirmities of human recollection, "their admission would go far to destroy the security which it is essential to preserve." Colt, J., in Shailer v. Bumstead, 99 Mass. 122.

⁴ Shailer v. Bumstead, 99 Mass. 122, and authorities cited. And see Johnson v. Lyford, L. R. 1 P. & D. 546.

⁵ Smith v. Fenner, 1 Gall. 170; Runkle v. Gates, 11 Ind. 95.

instrument,¹ especially if he looked personally after the details of drawing and executing his own will.²

In short, a testator's declarations, whether made before or after the execution of the will, aside from the time of execution itself, are admissible chiefly to show his mental condition or the real state of his affections; and they are received, rather as his own external manifestations than as evidence of the truth or untruth of facts relative to the exertion of undue influence upon him; they may corroborate, but the issue calls for its own proof from the living.³ And the more remote such declarations from the time when the will was executed, the less becomes their value. Declarations impertinent to the issue, moreover, are not admissible at all.⁴

§ 244. **Declarations, Admissions, etc., of Legatees or Parties in Interest.**—As in contests which involve a testator's mental capacity,⁵ so is it, according to the best authorities, with issues of fraud and undue influence, that the declaration or conduct of a legatee or party in interest, is not to be shown in evidence by way of an admission against interest, so long as other parties who would be affected thereby are not jointly interested nor in privity with them.⁶ The declarations against their interest of legatees who are not parties to the proceedings in court are in general inadmissible.⁷ But the admissions and declarations of a sole legatee may be thus proved against his interest;⁸ and courts have been disposed to admit such

¹ See *Hoshauer v. Hoshauer*, 26 Penn. St. 404; *Booth v. Kitchen*, 3 Redf. 52. Diaries or letters written by a testator, though admissible to show the condition of his mind and feelings, are not competent evidence of the facts stated therein to prove fraud or undue influence. *Marx v. McGlynn*, 88 N. Y. 357. Declarations of the testator's feelings when admitted may be shown to have no foundation in fact. *Canada's Appeal*, 47 Conn. 450. And evidence of declarations expressing only dissatisfaction with one's will and not tending to show undue influence or fraud is irrelevant. *Ryman v. Craw-*

ford, 86 Ind. 262; 28 Minn. 9; *Robinson v. Stuart*, 73 Tex. 267.

² *Pemberton Re*, 40 N. J. Eq. 520.

³ *Bush v. Bush*, 87 Mo. 480; *Middlewich v. Williams*, 45 N. J. Eq. 726; *Herster v. Herster*, 122 Penn. St. 239; 40 N. J. Eq. 520; 153 Mass. 487; *Eastis v. Montgomery (Ala.)* 1891.

⁴ 134 U. S. 47.

⁵ *Supra*, § 195.

⁶ *Shailer v. Bumstead*, 99 Mass. 129, and cases cited.

⁷ 99 Mass. 129; *Carpenter v. Hatch*, 64 N. H. 573.

⁸ *Ware v. Ware*, 8 Greenl. 42; *Nussear v. Arnold*, 13 S. & R. 323; *Fairchild v. Bascomb*, 35 Vt. 398. And see

evidence for the purpose of setting aside, if possible, the legacy of any one who has thus confessed himself a party to the fraudulent procurement of a will.¹

§ 245. **Suspicious Circumstance that the Will is drawn by the Party deriving a Benefit.**—In issues of fraud or undue influence, the circumstance that a party who derives under the will a disproportionate benefit or a benefit to which he had no natural claim is the party who drew it lends disfavor to the instrument, and may turn the scale against its admission to probate. The universal maxim of law treats one who writes himself the heir as lending suspicion to the writing. The civil law made little of setting aside any will which was written or prepared by the party deriving the essential benefit under it.² Our common jurisprudence does not adopt this rule in its full stringency; nevertheless a sense of propriety and delicacy clearly suggests that one who is to be directly benefited by a will to the considerable detriment of others in legal interest, should refrain from conducting the execution of it; and it is well settled that any will, prepared or procured by one thus interested in its provisions, imposes an additional burden, if assailed, upon those who seek to establish it; for the court, or the trier of the case, regards that circumstance with suspicion and jealousy, and desires to be satisfied that the paper which is propounded expresses the true will of the deceased and not that of the interested party.³ But on due explanation given, as all the evidence shows, and

Bush v. Bush, 80 Mo. 480; Saunders's Appeal, 54 Conn. 154; 54 N. Y. Supr. 77.

¹ See Morris v. Stokes, 21 Geo. 552; Blakey v. Blakey, 33 Ala. 611; Shailer v. Bumstead, 99 Mass. 129, by Colt, J.; Dotts v. Fetzner, 9 Penn. St. 88; Jackson v. Jackson, 32 Ga. 325; Wilbur v. Wilbur (Ill.) 1891. The declarations of a legatee tending to show that she exercised undue influence are not admissible where her husband is executor and a party to the suit. Crocker v. Chase (Vt.), 1 East. Reporter, 755.

² 1 Redf. Wills, 158, 159; 1 Wms. Exrs. 351.

³ Croft v. Day, 1 Curt. 784; Barry v. Butlin, 1 Curt. 637; s. c., 2 Moore P. C. 480; Paske v. Ollat, 2 Phillim. 323; Coffin v. Coffin, 23 N. Y. 9; Delafield v. Parish, 25 N. Y. 9; 1 Redf. (N. Y.) 1; Duffield v. Morris, 2 Harring. 375; 5 Ga. 456; Hughes v. Meredith, 24 Ga. 325; Downey v. Murphey, 1 Dev. & Bat. 82; Gerrish v. Nason, 22 Me. 438; Cuthbertson's Appeal, 97 Penn. St. 163; Patton v. Allison, 7 Humph. 320; Adair v. Adair, 30 Ga. 102; Cheatham v. Hatcher, 30 Gratt. 56.

the suspicion removed, the will stands, no matter who prepared it.¹ In short, the fact that the will was drawn by a favored legatee, while it calls for suspicious scrutiny of the circumstances, does not of itself invalidate the will, but the triers of the case weigh all the proof. And our later cases appear to rule that wherever the testator's draftsman may be thought worthy of some generous token, undue influence and fraud are not presumed from the fact that the will gives him a legacy accordingly.²

Nor is the testamentary act void, though the person who makes the will in his own favor is the agent and attorney of the testator; though the suspicion against the will becomes all the stronger in proportion as the testator was weak-minded, ignorant, or feeble, and must have confided in his draftsman's superior skill and experience.³ It is by no means uncommon in our States at this day, though a practice liable to abuse, for professional advisers to draw up wills which confer upon themselves all the influence and emolument of executor and trustee. Should the adviser write himself down, besides, for a legacy unreasonably great, being no natural claimant upon the testator's bounty, the will ought to be looked upon with no little suspicion.⁴ And the conduct of a professional man has sometimes avoided the will prepared by him on the ground that he allowed the testator to remain ignorant of legal consequences which would influence the instrument in his own favor as actually drawn up.⁵

¹ *Rusling v. Rusling*, 36 N. J. Eq. 603; *ib.* 269; 4 Redf. (N. Y.) 441; 45 N. J. Eq. 173. A court need not instruct a jury that the fact that the draftsman is largely benefited under the will is always a suspicious circumstance. 64 Md. 138. And see *Carpenter v. Hatch*, 64 N. H. 573.

² *Post v. Mason*, 91 N. Y. 539; *Carter v. Dixon*, 69 Ga. 82. *Cf.* *Yardley v. Cuthbertson*, 108 Penn. St. 395.

³ 1 Wms. Exrs. 112; 4 Hagg. 391; 3 Hagg. 587; *St. Leger's Appeal*, 34 Conn. 434; 1 Con. (N. Y.) 18.

⁴ But no presumption of fraud or undue influence arises from the fact

that the legal adviser and draftsman receives a legacy not unreasonably great. *Post v. Mason*, 91 N. Y. 539. But *cf.* *Cramer v. Crumbaugh*, 3 Md. 491, where the draftsman wrote himself executor, and with his son, both strangers in blood, took the chief part of the estate. See also *Carter v. Dixon*, 69 Ga. 82.

⁵ *Walker v. Smith*, 29 Beav. 394; *Hindson v. Weatherill*, 5 De G. M. & G. 301.

In *Barry v. Butlin*, 1 Curt. 637 (1838), Baron Parke announces in precise terms the rule which requires the court's suspicion to be overcome,

§ 246. **Confidential Relation in General implies Opportunities which must not be abused.**—In general, the existence of a confidential relation, as between guardian and ward, attorney and client, physician and patient, or even religious adviser and layman, is of a nature which implies peculiar opportunities outside the family relation, for influencing duly or unduly the making of a will contrary to the natural disposition of

before probate is granted of a will which is written or prepared by the party who takes a benefit under it. But he further disclaims the notion, that at our law there is any particular measure of unfavorable presumption, in such cases, which the propounder of the will must overcome, or any particular species of proof to be applied for that purpose, by way of additional evidence that the testator was not imposed upon. And he presses (what in such cases ought never to be left out of view) the extent, the proportion of the benefit which the party thus laid under suspicion has essentially derived under such a will. For instance, a man of immense fortune might bestow a certain sum by way of legacy upon his confidential adviser, without raising any serious suspicion to be overcome by special proof that the testator knew what he was about and acted freely; while a legacy of the same amount which would absorb the greater part of a moderate estate, to the sacrifice of the testator's immediate relations and their rights, would be viewed with far greater jealousy. Various other considerations, we may add, occur in the same connection; whether, for instance, this fact stands by itself or tends, with other facts, to establish fraud or undue influence; whether the draftsman had a natural claim; the character and situation of the parties; the harmony of the will with the testator's known intentions; and so on. To conclude in Baron Parke's own words, this drawing or preparing of the will amounts in no case to more than "a circumstance of suspi-

cion, demanding the vigilant care and circumspection of the court in investigating the case, and calling upon it not to grant probate without full and entire satisfaction that the instrument did express the real intentions of the deceased." See also *Coffin v. Coffin*, 23 N. Y. 9, where the draftsman was also one of the nearest relations of the testator.

Sinister conduct attending the execution of the will, as shown in keeping those away who were adversely interested, taking exclusive custody of the instrument after it was signed, etc., bear unfavorably against a draftsman. *Hollingsworth's Will*, 58 Iowa, 526; *Drake's Appeal*, 45 Conn. 9. So does proof of the testator's mental weakness or liability to imposition. *Cuthbertson's Appeal*, 97 Penn. St. 163; *Dale v. Dale*, 38 N. J. Eq. 274. Or that the draftsman made alterations of the instrument in his own favor under such circumstances. *Yardley v. Cuthbertson*, 108 Penn. St. 395. Or that the will did not harmonize with the testator's general intentions. 7 Lans. 443; *Morris v. Stokes*, 21 Ga. 552. See 4 Redf. (N. Y.) 409, 441.

But secrecy maintained in making or executing the will may be satisfactorily explained, § 231. And a draftsman or attorney may receive a moderate legacy from a competent testator, without raising an assumption of unfair dealing on his part. *Loder v. Whelpley*, 111 N. Y. 239; *Soule's Will*, 1 Con. (N. Y.) 18. The mere presence of legatees (such as relatives) at the execution of a will raises no inference of undue influence.

blood or marriage. Such opportunities must not be abused ; and whenever a will appears to have been procured through the zealous intervention of one occupying this favored position, to his own especial advantage, and to the prejudice of natural objects of one's bounty, fraud and undue influence will readily be inferred, unless all jealous suspicion is put to rest by the evidence adduced to sustain it.¹ At the same time such an unfavorable suspicion amounts to nothing more than a presumption of fact, and may always be overcome by proof that a testator of suitable intelligence made his will as he saw fit.²

The bearings of this doctrine may be gathered from our previous section. Equity appears often to have so far presumed a fraud, where one holding such a confidential relation takes a gift, as, at least, to have imposed upon him the *onus* of disproving it. Certainly no such strict rule pertains to the law of wills ;³ and in gifts of this character the beneficiary may have been utterly ignorant of the giver's intentions, and stand entirely clear of personal influences upon the disposition ; while the gift itself remains revocable and may only be disclosed at the donor's death, when the essential question to be answered is, what disposition shall take effect upon his estate, and when others in interest and not the donor himself, are parties to any litigation for setting the gifts by his purported disposition aside. All that can be safely said is, that the especial gift, together with the opportunity for procuring it, affords ground for suspicion ; and that for establishing the will it must be satisfactorily shown that the testator was of

¹ See cases cited in preceding section ; *Harvey v. Sullens*, 46 Mo. 147 ; *Tyler v. Gardiner*, 35 N. Y. 559 ; *Soule & Co. v. Con.* 18 ; *Moore v. Spier*, 80 Ala. 129. In *Yardley v. Cuthbertson*, 108 Penn. St. 395, where the testator, while sick and enfeebled, cut down former legacies four-fifths in a codicil which gave the residue to his confidential adviser, it was held that the suspicion of undue influence was inferable, and required to be repelled. The will of a ward, giving all or nearly all the estate

to the guardian, raises a strong suspicion of unfairness which should be repelled. *Meek v. Perry*, 36 Miss. 190. But this suspicion being repelled by suitable proof, the will is sustained. *Breed v. Pratt*, 18 Pick. 115.

² 1 Con. (N. Y.) 18 ; 46 N. J. Eq. 515. Evidence that the testator made unequal gifts among his next of kin during his life is admissible. *Eastis v. Montgomery* (Ala.) 1891.

³ See *Parfitt v. Lawless*, L. R. 2 P. D. 462.

sound mind, that he clearly understood the contents of the will, and that he was at the time under no undue or improper constraint of volition, such as to destroy his own free agency. The superiority attached to such an influence is its distinguishing trait; the relation being such that the testator, especially if of weak or declining power, leans upon a guide, in whose honor he must confide, and that honor a court of equity is bound to insist upon. Yet the strength of the suspicion in each case must depend upon its own circumstances; and where it does not appear that the fiduciary drafted the will, advised as to its contents, or even knew it was to be made, there can be no imputation of fraud or undue influence so far, at least, as his connection with the testator is concerned, whatever reasons for assailing the will may be founded in the misconduct or confidential relations of others.¹

The benefit thus derived by one who holds a confidential relation, need not be a strictly personal one in order to excite suspicion;² for undue advantages procured for those of his own household, or church fellowship, for institutions or business establishments in which he is strongly interested, and

¹ *Bristed v. Weeks*, 5 Redf. 529.

To sustain a will made in favor of the testator's religious adviser, to the exclusion of the natural objects of his bounty, there must be some proof besides the making of it. But if the will is shown a consistent one, and freely and intelligently made, it will be sustained. *Marx v. McGlynn*, 88 N. Y. 357; 4 Redf. 455; 6 Dem. 166. Even where a religious adviser draws or actively prepares a will in favor of the church or charitable institution which he represents, ignoring the natural heir, slight circumstances may justify a jury in inferring undue influence. *Ib.*; 5 Mo. App. 390; *Welsh Re*, 1 Redf. 238. And suspicions requiring an explanation may be raised by the facts and surrounding circumstances, even though the will in favor of a church was drawn and its execution procured by vestrymen. *Drake's Appeal*, 45 Conn. 9.

(Note the dissent in this case.) Where a testator embraces spiritualism, and the medium or adviser alienates his affections from his family and procures a will in his own favor, it should be set aside. *Thompson v. Hawks*, 14 Fed. Rep. 902; 7 Oreg. 7. As to legacies to one's spiritual adviser, see further 88 Ala. 462. As to a physician who was made sole legatee, see 6 Dem. 299.

That a beneficiary was the testator's partner raises no presumption of undue influence. *Brooks's Estate*, 54 Cal. 471.

² See *Welsh Re*, 1 Redf. 238; *Drake's Appeal*, 45 Conn. 9. The disfavor with which a bequest from a ward to his guardian is regarded extends to a bequest to the guardian's wife. *Bridwell v. Swank*, 84 Mo. 455. And see 43 N. J. Eq. 154.

the like, may in a broad sense be intended for his own benefit; and so, too, where, to gratify some dislike of his own, he gets the testator to disinherit a blood relation. But the fairer and more disinterested the influence he exerts, the less does the confidential adviser expose himself to suspicion. The fact that the person largely benefited lived with the testator establishes a confidential relation in a sense.¹

§ 247. **Proof that the Testator knew the Contents of the Will.**—Where error, fraud, or undue influence is charged, stricter proof than usual may be needful to show not only capacity, but that the testator knew the contents of the instrument he executed. In ordinary cases, to be sure, the formal execution of the will by a person who can read and write imports a knowledge of its contents.² But where it is shown that the testator, being blind, illiterate, or very feeble, could not have gained this knowledge unaided, more positive proof that he actually knew and assented is required to repel any suspicion which circumstances may have cast upon the good faith of the transaction; as, for instance, where the draftsman or party managing the execution of the will takes a disproportionate interest under it.³ It is not necessary to prove in such cases that the will was read over to the testator, nor to show written instructions from him; but it should appear that in some way its contents were correctly imparted to him and corresponded with his wishes.⁴ And it

¹ 116 Penn. St. 612; 6 Dem. 84; *Grove v. Spiker*, 72 Md. 300 (where a stranger went to live with a weak-minded woman, and soon gained great dominion over her).

² *Beall v. Mann*, 5 Ga. 456; 20 Ga. 709; *Frear v. Williams*, 7 Baxt. 550; *Vernon v. Kirk*, 36 Penn. St. 268; *Pettes v. Bingham*, 10 N. H. 514; *Downey v. Murphey*, 1 Dev. & B. 82; *Smith v. Dolby*, 4 Harring. 350.

³ *Davis v. Rogers*, 1 Houst. 44; *Hughes v. Meredith*, 24 Ga. 325; *Kelley v. Settegast*, 68 Tex. 13; 115 Penn. St. 32; *Lyons v. Campbell*, 88 Ala. 462; *Wilbur v. Wilbur* (Ill.) 1891.

⁴ *Ib.*; *Barry v. Butlin*, 1 Curt. 637; *Moore v. Moore*, 2 Bradf. 261; *Huss's Appeal*, 43 Penn. St. 73; *Day v. Day*, 2 Green Ch. 549. Thus, it might be shown that the will was copied from a previous paper, whose contents the testator fully understood and approved. *Day v. Day*, *supra*. But if it appear that essential alterations or deviations were made in the copying, further proof is needful to show that the alterations or deviations were expressly understood and approved, or else that the instrument stands in its final form. *Chandler v. Ferris*, 1 Harring. 454.

should be borne in mind, that where fraud or undue influence is imputed, proof of the testator's actual knowledge of contents and soundness of mind do not alone establish the will, but his free volition should appear besides.¹

§ 248. **Probate in Part, where Fraud, Undue Influence, etc., operated in Part.**—It is considered by good English and American authorities, that where fraud or undue influence has been exercised in obtaining advantages under a will, the whole will is not necessarily vitiated, but the gifts thus wrongfully obtained may be declared invalid while the will is in other respects admitted to probate.² So, too, the wrongful alteration or insertion of a pecuniary legacy in a will, by the legatee or a stranger, is held not to avoid the will as to other bequests.³ And the same would appear to hold true where such alteration has been innocently made.⁴ For if the fraud or error tended plainly to some partial and particular result while the instrument as a whole embodied the disposition of a person of sound and disposing mind and free volition, the testator having fully determined to make his will, innocent legatees ought not to be punished indiscriminately with those who were in the wrong. But to separate for probate the volition and non-volition portions of a will is not commonly practicable; for fraud and undue influence are found usually to have permeated the whole disposition and even to have set the alleged testator to making it. Hence we may lay it down, that fraud or undue influence in procuring one legacy or devise does not invalidate other legacies or devises which evidently proceed from the free will of a competent testator, and are separable; but if the fraud or undue influence taints inseparably the entire will, though exerted by or in behalf of one legatee only, the whole disposition must fail.⁵ In other

¹ *Yardley v. Cuthbertson*, 108 Penn. St. 395.

² *Allen v. M'Pherson*, 1 H. L. Cas. 191; 1 Jarm. 36; *Welsh Re*, 1 Redf. 238; *Trimlestown v. D'Alton*, 1 Dow (N. S.) 85; *Morris v. Stokes*, 21 Geo. 552; *Harrison's Appeal*, 48 Conn. 202; 54 Conn. 119.

³ *Smith v. Fenner*, 1 Gall. 170; *Morrell v. Morrell*, 7 P. D. 68.

⁴ *Ib.* And see *Whitlock v. Wardlaw*, 7 Rich. 453; 91 Penn. St. 236.

⁵ *Florey v. Florey*, 24 Ala. 241; *Welsh Re*, 1 Redf. (N. Y.) 238; *Baker's Will*, 2 Redf. 179.

The inquiry whether the will was

words, where part of a will has been introduced through fraud, or perhaps inadvertence, it may be rejected, and probate granted of the residue, if the two are severable; but not otherwise.¹

§ 249. **In General, a Full Probate does not insure against a Partial Failure in Effect.** — On the other hand, a decree of the court of probate not appealed from does not absolutely conclude that all its provisions are valid in their full effect, as they appear expressed, but construction or further litigation may establish to the contrary. As if a person too young under the statute to make a will of realty, but old enough to make one of personalty, should execute a testament embracing both kinds;² or where the will can be pronounced inoperative and void in parts, in consequence of the subject-matter and the character of the disposition attempted.³ If the will may take effect in any part, it is properly admitted to probate, notwithstanding some of its provisions should prove void eventually from one cause or another.⁴

§ 250. **Full or Partial Failure of Probate through Incapacity, Fraud, Error, etc.** — In fact, courts of probate exercise complete control over the will, in case of fraudulent insertion or alteration, or of incapacity during the execution of part.⁵ A word or clause in the will introduced by mistake or fraud, without the testator's knowledge or approval, may, at judicial discretion, be stricken out.⁶ A will defaced or mutilated by a testator while *non compos* is, if possible, to be pronounced

procured through fraud or undue influence cannot be stilled by any prohibition contained in the instrument itself; for this would allow fraud to protect fraud. *Lee v. Colston*, 5 T. B. Mon. 246. Cf. 19 Ohio St. 546; § 605.

¹ *Rhodes v. Rhodes*, 7 App. Cas. 192. A codicil which ought to fail is thus severable from a valid will and prior codicils. See *Ogden v. Greenleaf*, 143 Mass. 349.

² *Dickinson v. Hayes*, 31 Conn. 417. It was here held that the will might be contested in an ejectment suit, with-

standing the probate. But cases of this sort can seldom arise outside the probate court, as legislation now provides. See *supra*, §§ 39-44, as to disability of infants.

³ *Bent's Appeal*, 35 Conn. 523; 38 Conn. 26.

⁴ *George v. George*, 47 N. H. 27.

⁵ *Welsh Re*, 1 Redf. 238, 248.

⁶ *Morrell v. Morrell*, 7 P. D. 68; *Duane, Goods of*, 2 S. & T. 590; *supra*, § 248; *Rockwell's Appeal*, 54 Conn. 119.

for in its original integrity.¹ Codicils, moreover (which are as much a part of wills as if actually incorporated into the instrument, and draw the will down to their date), are on similar grounds rejected, leaving the will to operate without one or another of them, as justice may require.²

§ 251. **Inspection of Instrument by Jury.**—Where the issue of mental capacity or undue influence is raised, and a jury tries the question of fact, the authentication of the instrument in probate in due form of law should be determined by the court. But the instrument in contest may be submitted for inspection to the jury; and there is no impropriety in allowing this inspection, before the evidence is given, but often the reverse; since the evidence must be tested by the instrument in question.³ The instrument offered should of course be considered in connection with the other evidence adduced, and not by itself alone.⁴

§ 251 *a*. **Mental Capacity and Undue Influence are Distinct Issues.**—In a controversy over the probate of an instrument as one's last will and testament, mental capacity and undue influence are distinct issues, and probate may be refused on the one ground or the other.⁵

¹ *Scruby v. Fordham*, 1 Add. 74; 3 Hagg. 754; *Batton v. Watson*, 13 Geo. 63.

² *Brounker v. Brounker*, 7 Phillim. 57; *Sherer v. Bishop*, 4 Bro. C. C. 55; *Billingham v. Vickers*, 1 Phillim. 187; 1 Wms. Exrs. 42; 1 Bradf. 360; 143 Mass. 349.

³ *Rees v. Stillè*, 38 Penn. St. 138.

⁴ *Vance v. Upson*, 66 Tex. 476; *Midlewitch v. Williams*, 45 N. J. Eq. 726.

⁵ See *Dexter v. Codman*, 148 Mass. 121, where the court set aside the finding of a jury on the former ground, but sustained it on the latter.

PART III.

FORMAL REQUISITES OF A WILL.

CHAPTER I.

WHAT CONSTITUTES A WILL.

§ 252. Wills are written or unwritten; Modern Legislation requires most Wills to be in Writing and duly witnessed. — Having finished our subject of testamentary capacity, and dealt sufficiently with the person who makes a will, let us now proceed to consider the testamentary instrument itself and its essential constituents. As to the general nature of a will our law sets forth two kinds: (1) the written, and (2) the oral or nuncupative. But at the present day, the statutes both of England and the various American states, insist, that, with a few stated exceptions, all wills, whether relating to real or personal property, or to both, shall be expressed in writing; and moreover that this written instrument shall be formally executed in presence of a stated number of witnesses. The effect of such legislation is to abolish much of the old learning which pertains to the subject, and leave our testamentary law to shape itself in a modern and more precise mould. Even so recent a writer as Blackstone ceases to be a standard authority; for, while conceding that the Statute of Frauds, 29 Car. II. c. 3, has laid nuncupative or unwritten wills under many restrictions, he draws the line boldly between devises of real estate and wills of personal property, as constituting dispositions of quite a different nature; and as to the latter kind, lays it down that they need no witnesses, nor even the testator's own signature, if only the testator be shown to have written it or caused it to be written.¹ This

¹ 2 Bl. Com. 501, 502.

unquestionably was English law when Blackstone discoursed ; but what that eminent expounder pointed out as the safer and more prudent way, and indeed the method which in Bracton's early time borrowed a sanction from Roman jurisprudence, namely, that the will be signed [or sealed] by the testator, and published in the presence of witnesses,¹ has, since 1838, become, for real and personal property alike, the imperative rule in England ;² while in this country, where the feudal system never found a chance to take root, local experience brought various local legislatures quite early to the same discreet and harmonizing policy. 29 Car. II. put the first strong curb in both countries upon frauds and perjuries in wills of personal property ; and from that landmark of legislation the sturdy sense of both England and most American States worked independently towards the more radical reform, here embodied in various local enactments differing somewhat in general principle, but there in the statute of 1 Vict. c. 26, passed in 1837, and familiarly styled the Statute of Wills.³

§ 253. **Real and Personal Property now treated alike ; but not so formerly.** — While the former differences prevailed in point of formality, which the Statute of Frauds did not pretend to overcome, it would often happen that a will which sought to dispose of both real and personal property would take effect as to the latter, but fail as to the former for insufficiency in signing, sealing, or witnessing. But by Stat. 1 Vict. c. 26, the same formalities concerning execution and attestation (but with two instead of three witnesses) are prescribed for property of every description ; and upon all wills made in English jurisdiction later than 1837 does the new rule operate.⁴

In this country the prevailing policy at this day makes no distinction of formalities between the different kinds of

¹ 2 Bl. Com. 502.

² 1 Wms. Exrs. Preface ; 2 Jarm. Wills, Appendix.

³ See *supra*, §§ 14-16.

The term "will" in our modern legislation has a broad scope, and may usually be said to include every kind of

testamentary act taking effect from the mind of the testator and manifested by an instrument in writing. *Bayley v. Bailey*, 5 Cush. 245.

⁴ See preface to 1 Wms. Exrs. ; 2 Jarm. Wills, Appendix.

property ;¹ but the will, whatever the description of property to which it relates (and property real, personal, or mixed, are in these days usually embraced together), requires the same mode of subscription and attestation. But there appear to be a very few States of this Union still, where wills of real estate must be executed and attested with formalities less indispensable for disposing of personalty.¹

§ 254. But American Statutes relating to Wills are of Local Origin. — But here let us remark, what never should be for-

¹ The legislation of most of our American States on this subject is based upon the English Statute of Frauds, and insists that three (or at least two) witnesses shall subscribe, and that the will of real estate itself shall be in writing and signed by the testator. From this starting-point of a devise, legislation and practice tended to the requirement that wills of personal property should be in writing and similarly executed and attested; and at length the local law has reached a general and uniform system. Wills must now be written and attested by either two or three witnesses, as the legislature may have preferred, but with the same number for both real and personal property. Many States model their testamentary law after the Massachusetts statute, which dates back to 1836, and requires wills both of real and personal estate to be in writing and signed by the testator, or by some person in his presence, and by his express direction, and attested and subscribed in his presence by three or more competent witnesses. In this State the English Statute of Frauds was re-enacted in 1783; and this extension to personal property antedates by a year the English enactment of Victoria.

Various States, again, have copied the New York statute, whose verbal expression is quite different, and which requires, like the new English statute of Victoria, two instead of three witnesses. See *McElwaine Re*, 18 N. J. Eq. 499. There are others of the original States,

such as Pennsylvania and Virginia, whose legislation on the subject does not resemble that of either Massachusetts or New York. See *Hegarty's Appeal*, 75 Penn. St. 503. In Pennsylvania, a subscription by witnesses is in many instances dispensed with. § 256, *post*.

The laws of South Carolina, until recently, required three witnesses to a will of real estate only; but the same formality is now extended to wills of personalty. On the other hand, in Mississippi, wills, if not wholly written out by the testator, require the attestation of three witnesses for real estate, and only one for personalty. In Tennessee, the code discriminates. *Davis v. Davis*, 6 Lea. 543. See the local statutes referred to; also 1 *Jarm. Wills*, 77, Am. Ed. Bigelow's note; holograph wills, *post*. When Chancellor Kent wrote his Commentaries, wills with a formal execution by the testator and witnesses were scarcely required in the United States except for devising real estate. See 4 Kent Com. 505.

The civil code of Louisiana embodied a system altogether unique, which other States do not adopt. All wills are here divided into three leading classes: (1) nuncupative or open wills (which have acquired a peculiar signification in Louisiana practice); (2) mystic or sealed wills; (3) olographic (or holograph) wills. The details of execution in each instance are set forth minutely. See La. Rev. Civ. Code, § 1567 *et seq*.

gotten, that our various American statutes relating to wills are of local and independent origin; and though their strong tendency is to harmonize in general essentials, they always differed and must continue to differ in particulars as well as mode of expression; and that while the local disinclination to change such statutes is founded in obvious reasons, every radical change in State legislation must be held to operate by its local date of enactment.

All this serves as a caution preliminary to discussing the formal requisites of a testament'; and to add to the confusion of precedents we must observe further, that the testamentary law of continental Europe has influenced various States at the South-west, colonized by French and Spanish settlers, — Mississippi and Louisiana, for instance, — in favor of holographs and other peculiar modes of testamentary disposition with which the pure Anglo-Saxon stock is little familiar.

§ 255. **Holograph Wills; how far recognized by Legislation.** — Under statutes like those of England, Massachusetts, and New York at the present day, and, indeed, by the policy which now prevails throughout England and most parts of the United States, holograph wills, or those written out by the testator's own hand, stand on no privileged footing, but require to be attested like any other testaments. Of such wills of chattels, to be sure, it was formerly held that if the name of the testator was written by himself in any part of the instrument, his final signature at the end might well be dispensed with;¹ and it must ever be taken that writing one's own will affords the strongest proof of authenticity and a deliberate purpose; yet, whoever writes out the will, the

¹ *Griffin v. Griffin*, 4 Ves. 197 n.; *Coles v. Trecothick*, 9 Ves. 249; 3 Lev. 1; 2 Bl. Com. 501; Gilb. 260. "I speak not here of devises of lands, which are quite of a different nature, being conveyances by statute, unknown to the feudal or common law, and not under the same jurisdiction as personal testaments; but a testament of chattels, written in the testator's own hand, though it has neither his name nor seal

to it, nor witnesses present at its publication, is good, provided sufficient proof can be had that it is his handwriting." 2 Bl. Com. 501. Though written in another man's hand, and never signed by the testator, it might be proved to be according to his instructions and approved by him; but such establishment of a will was, of course, more difficult. See *ib.*

same necessity exists at the present day, for a formal signature, and a specified number of subscribing witnesses.

But in a few of the States holograph wills are expressly recognized, following usually the Louisiana civil code on this subject,¹ but in some instances originating in the old English colonial law. The holograph will, under such statutes, dispenses with subscribing witnesses and the usual proof of a formal execution; but these codes require it to be entirely written, dated, and signed, by the testator's own hand.² This handwriting being proved, the will becomes legally established.³ The Tennessee and North Carolina codes guard such a will with still greater caution in some respects; the writing must come from unsuspected custody for safe-keeping or be found among the testator's valuable papers, in order to be thus privileged.⁴

§ 256. **Other Statute Peculiarities as to Form, Signature, and Attestation.**—In other respects a few American codes contain peculiar provisions as to the form, signature, and attestation of wills. Thus the Pennsylvania statute appears to have long dispensed with formal attestation, even in a devise of lands, provided the authenticity of the will can be proved by at least two competent witnesses.⁵ The dictation of a will

¹ La. Civ. Code, arts. 1581, 1588.

² *Ib.* But *cf.* *Reagan v. Stanley*, 11 Lea. 316; *Myrick Prob. (Cal.)* 5. It is sufficient compliance with the Louisiana code, that the holograph will bears date in a certain month and year without naming the day. *Gaines v. Lizardi*, 3 Woods C. Ct. 77.

³ 13 S. & M. 406; 11 *Humph.* 377, 465; *Davis v. Williams*, 57 *Miss.* 843. If a printed form is filled up by the testator, this is not a holograph will. *Rand's Estate*, 61 *Cal.* 468.

⁴ *Tate v. Tate*, 11 *Humph.* 465; 91 *N. C.* 26.

Holograph wills are favored in the wills acts of Kentucky, Tennessee, Mississippi, California, and Louisiana. So, too, as it appears, by the codes of Arkansas, North Carolina, Texas, Virginia,

and West Virginia. The Arkansas statute requires a holograph will to be proved by three disinterested witnesses, swearing to their opinion, though no subscribing witness is needed. See also 34 *Fed.* 82; *Stimson's Am. Stat. Law*, § 2645. No such holographic will can bar a will in the ordinary form.

⁵ See 1 *Jarm. Wills*, Am. Ed. Bigelow's note; *Hight v. Wilson*, 1 *Dall.* 94; 1 *Watts*, 463. Proof of the testator's signature thus afforded is *prima facie* evidence of its execution though the will was not a holograph. *Wiegel v. Wiegel*, 5 *Watts*, 486. As to his holograph, see 131 *Penn. St.* 220. If the testator be *in extremis*, his signature is dispensed with; but otherwise, the will should be signed by him, or by some one in his presence, and by his express

while *in extremis* stands, moreover, under some local codes, upon an exceptional footing of favor.¹

§ 257. **A Will not properly executed and attested, is Inoperative under Modern Statutes.**—Under our modern statutes which require a will to be duly executed and attested by a certain number of subscribing witnesses, in order to give it effect, there can be no judicial evasion in favor of informal writings. Hence, if an instrument is in its true character testamentary, but has not been properly attested, the fact that the maker never revoked or repudiated it during his life,

direction; and in all cases two or more competent witnesses (though not subscribing ones) should establish its authenticity. 5 Whart. 386; Showers v. Showers, 27 Penn. St. 485. See Wall v. Wall, 123 Penn. St. 545, where the testator died before his intended will was finished.

As to the Maryland code, with respect to a will of chattels, see Byers v. Hoppe, 61 Md. 206.

In Tennessee, entries made in one's diary, which purport to dispose of the writer's property after his death, may constitute a holographic will. Reagan v. Stanley, 11 Lea, 316. Even although neither signed nor attested, these entries may be set up as a will of personalty, on sufficient proof of the handwriting. *Ib.* A holograph will is not deprived of that peculiar character by the fact that there are witnesses to it. Roth's Succession, 31 La. Ann. 315. And see for the case of a holograph will established where an ineffectual attempt was made to formally execute a clean copy of it, Wilbourn v. Shell, 59 Miss. 205. See § 312, *post*.

In Virginia a holograph will, with the testator's name at the commencement but not subscribed, with a blank left for the date, and containing an attestation clause but no witness, is held to be not well executed. Waller v. Waller, 1 Gratt. 454. See Warwick v. Warwick, 86 Va. 596. But in North Carolina an instrument with the requi-

site number of witnesses, one of whom is decided to be incompetent, may be proved, nevertheless, as a holograph will. Brown v. Beaver, 3 Jones, 516. In Kentucky a will which is wholly written out and signed by the testator requires no attestation. Toebe v. Williams, 80 Ky. 661. But an unattested codicil, written and subscribed by the testator, and hence executed as the statute requires, cannot bring into operation an unattested will not wholly written by the testator. 83 Ky. 584. And see 80 Va. 293.

In Skerrett's Estate, 67 Cal. 585, a letter addressed to a sister, with a copy of a deed of gift—all in the brother's hand—was probated as a holographic will.

As to the validity of a holograph will under Scotch law, see Whyte v. Pollok, 7 App. Cas. 400.

¹ See Pennsylvania rule as stated in preceding note; also Godden v. Burke, 35 La. Ann. 160; Hegarty's Appeal, 75 Penn. St. 503.

To constitute a good will of personalty, by the Maryland rule, the paper must either be complete on its face, or if incomplete and defective, it must appear that the testator intended it to operate as his will, in its finished or incomplete state, or that he was prevented from completing it by sickness, death, or some other casualty. Plater v. Groome, 3 Md. 134.

gives it no validity for a probate.¹ Nor can the paper thus intended to operate as a will be turned into a declaration of trust, so as to defeat the statute which prescribes how such wills shall be executed.² In short, that which was intended as a will cannot legally take effect as such, unless executed with such formalities as public policy may have seen fit to impose for the better protection of titles against fraud and uncertainty.³

§ 258. Requirement of Writing, how satisfied; Materials to be used.—The old Statute of Frauds, and the modern codes generally, require the will to be in writing; and no compliance can be so natural and proper as the usual one, namely, the use of pen, ink, and paper. But if written in a printed or engraved blank, a will, like a deed, well satisfies the statute;⁴ and so, too, even though the entire will were printed, lithographed, or engraved (a practice certainly not so common, since every will must have its individual traits, and multiplied copies are useless), or prepared by the type-writer, hectograph, or any similar process.⁵

It is here to be observed that the policy of the law seeks materials and a mode of writing which shall sufficiently avoid the danger of fraudulent change or obliteration, and constitute for probate and public registry an instrument which shall express plainly and permanently on its face the testator's final language as to his disposition. As between ink and pencil, the former, or, at least, that substance whose marks cannot be erased without leaving a sure sign, is decidedly preferable; yet it is generally held that a will written or altered in lead-pencil instead of ink would be good.⁶ Doubt-

¹ *Gough v. Findon*, 7 Ex. 48; *Robinson v. Schly*, 6 Ga. 575; *Watkins v. Dean*, 10 Yerg. 320; *Turner v. Scott*, 51 Penn. St. 126; *McCarty v. Waterman*, 84 Md. 550, and cases cited.

² *Long's Appeal*, 86 Penn. St. 196.

³ Equity courts cannot supply the defective execution of a will. *Robson v. Jones*, 3 Del. Ch. 51.

⁴ 1 Redf. Wills, 165; *Henshaw v. Foster*, 9 Pick. 312; *Temple v. Mead*, 4 Vt.

536; *Adams, Goods of*, L. R. 2 P. & D. 367; *Dench v. Dench*, 2 P. D. 60; L. R. 3 P. D. 159.

⁵ *Ib.* It is a rule of long standing, that where a statute requires writing, it is satisfied by printing. *Schneider v. Norris*, 2 M. & S. 286.

⁶ *Dyer Re*, 1 Hagg. Eccl. 219; 1 Add. 406; 1 Redf. Wills, 165; 1 Wms. Exrs. 111; *Dickenson v. Dickenson*, 2 Phillim. 173; *Mence v. Mence*, 18 Ves.

less, there are extreme cases where one has not in his haste the choice of materials ; and if such extremity be shown, and the will proved a genuine one, signed and witnessed after the regular form, a court should not strain at fine objections.

But while one may write his will upon any material and in any mode, when forced to do so, a risk is incurred where the selection of materials, deliberately made, is an imprudent one and obnoxious to the legislative policy. Thus, it is held in Pennsylvania that anything so easily rubbed out or altered as a writing on a slate, contravenes the policy of the law and cannot be admitted as a will, though intended by the decedent as her last will and testament.¹ So, too, the use of a pencil or other materials undesirable for such solemn acts, may bear significantly upon the question, whether the act was performed with a full and final testamentary intent or only as something incomplete and preliminary. One may make erasures and alterations with a lead-pencil on a will prepared in ink, and the instrument so corrected may pass to probate ;² but changes of this sort are never presumed to be deliberate and intended for a *bona fide* final correction, but rather the reverse ; and in English probate practice the rule has long been established, to treat alterations made in lead-pencil as *prima facie* deliberative only, but alterations in ink as final and absolute.³

§ 259. **Language, Native or Foreign, in which a Testament should be expressed.** — A testament may be written out in any language, provided the testator himself understands essentially what the will contains.⁴ But with witnesses it

348; Bateman v. Pennington, 3 Moore P. C. 223; Myers v. Vanderbelt, 84 Penn. St. 510; Harris v. Pue, 39 Md. 535; Knox's Estate, 131 Penn. St.

¹ Reed v. Woodward, 11 Phila. 541. But whether a slate and pencil might not be used in an extreme case (such as of course seldom occurs), there being no other writing materials available, *quære*.

² See Fuguet's Will, 11 Phila. 75; 1 Wms. Exrs. 111.

³ 1 Redf. Wills, 166; 1 Hagg. Ecc.

322, 490; 1 Add. 406; Dickenson v. Dickenson, 2 Phillim. 173; L. R. 2 P. & D. 256. Where a printed form is filled up partly in ink and partly in pencil, and the writing in ink makes sense with the form without help from the writing in pencil, the ink form is to be considered the true and final one. Adams, Goods of, L. R. 2 P. & D. 367.

⁴ 1 Wms. Exrs. 110; Swinb. pt. 4, § 25, pl. 3; Green v. Skipworth, 1 Phillim. 58; Walter's Will, 64 Wis.

seems proper, as with the testator himself, to consider what knowledge enables the particular duty to be intelligently performed. A testator, even though ignorant of the language in which the will is expressed, should feel assured that the language used expresses his intention rightly; and where doubt is entertained on this point, the correctness and *bona fides* of the translation should be satisfactorily established in probate. As for witnesses, however, a knowledge of what the will contains is by no means indispensable in modern practice; but such persons should at least know the nature of the act they are performing, and sign no attestation clause, at all events, whose meaning is not clear to their minds.¹

§ 260. **A Will should be legibly written.** — A will should be legibly written, in order to operate. But the aid of experts and those familiar with one's blind handwriting may be invoked for the purpose of making clear what the will contains.² For interpreting a cipher, too, or words in an unknown tongue, a corresponding rule is useful.³

§ 261. **A Will need not be dated, etc.** — As with formal attestation clauses, so with descriptions of the date or place of execution; they are not material in any will unless the local statute expressly makes it so. Such formalities are certainly useful; but wills have been sustained as valid, though having no date or even a wrong one inserted.⁴ With

487. If the testator be a domiciled Englishman, the effect of the foreign tongue employed can only be looked at in order to ascertain the English expressions which correspond. *Reynolds v. Kortright*, 18 Beav. 417.

A will may be refused probate, where it appears in evidence that the alleged testator could not write nor understand the English language, in which the paper propounded was written, and that nothing was said or done indicating that he knew he was making a will. *Miltenberger v. Miltenberger*, 78 Mo. 27. But a will drawn in accordance with the testator's instructions, and duly exe-

cuted with knowledge of its contents, is valid although written in English, a language which the testator (here a German) did not understand. *Walter's Will*, 64 Wis. 487.

¹ *Adams v. Norris*, 23 How. 366; *Breaux v. Gullusseaux*, 14 La. Ann. 233.

² In *Masters v. Masters*, 1 P. Wms. 421, reference was made to a master in chancery to find out, by taking testimony, the meaning of illegible words and figures in the will.

³ See Part VI. c. 3, *post*, as to extrinsic evidence to explain ambiguities, etc.

⁴ *Wright v. Wright*, 5 Ind. 389; *Deakins v. Hollis*, 7 Gill & J. 311; 79

reference to its effect or even to its legality, the date may be of much consequence; but this may be established or corrected by parol evidence showing the real date of its execution.¹

§ 262. **Formal Words like "Will," "Testament," "Devise," "Bequest," are not Essential.** — A will may be valid and operate as such (apart from legislation) without such formal words as "will," "testament," "devise," or "bequest." Thus where a will began, "The request of C. I want R. to have my place as long as he shall live," etc., it was held a valid one.² And though a duly executed paper should say "I have given" instead of "I give," it may be shown that the intention was future and posthumous, so as to render it testamentary.³

§ 263. **A "Will" is Something Imperative, though Softer Words are employed.** — But a "will" is something imperative even though the testator should choose to employ some softer word to denote it. Doubtless his true intention, as the context may indicate, will operate in the details of the disposition; as in determining whether a party named in the will shall absolutely or at his own discretion perform a certain duty or appropriate a certain fund.⁴ But, generally speaking, where property is given by testament to some person, who is recommended, requested, or wished, to dispose of it after a certain manner, this wish, request, or recommendation is commonly considered imperative and equivalent to creating a trust.⁵ And as for the will, the testamentary disposition

Ky. 607; 40 Ark. 144. Compare § 255, *supra*, as to holograph wills and the local codes which favor them.

¹ *Ib.*

² *Camp v. Stark*, 10 Phila. 528. And see *Miars v. Bedgood*, 9 Leigh, 361; *Wood, Matter of*, 36 Cal. 75; *Mundy's Goods*, 2 S. & T. 119.

³ *Coles, Goods of*, L. R. 2 P. & D. 362.

⁴ *Wells v. Doane*, 3 Gray, 201, and cases cited; *Wynne v. Hawkins*, 1 Bro. C. C. 179.

⁵ 1 Wms. Exrs. 108, and cases cited;

Passmore v. Passmore, 1 Phillim. 218; *Brunson v. King*, 2 Hill Ch. 490; *Knight v. Broughton*, 11 Cl. & F. 513. And see *post*, § 595, as to construction of wills. Lord Cranworth in *Williams v. Williams*, 1 Sim. N. S. 358, lays it down that the real question in such cases is, whether the testator means by such expressions to govern the conduct of the party addressed, or indicate what seems to himself a reasonable exercise of discretion, leaving it, however, to that party to exercise his own discretion.

itself, its natural operation is absolute and imperative, though never so gently expressed;¹ for such an instrument as a will whose sanction rests upon the arbitrary discretion of a court or surviving individual, which prays instead of declaring a devolution of title, is almost unheard of, and never to be favored by construction.²

§ 264. **The General Form of Testamentary Instruments; Effect of Legislation.** — So much for the statute requisites, and the materials with which wills are written. Now to discuss more generally the form of testamentary instruments. In jurisdictions which insist that wills shall be not only signed but attested by two or perhaps three witnesses, and in those, most of all, where a formal clause of attestation cannot be dispensed with, any uncertainty as to what writings shall or shall not be pronounced testamentary ranges within a narrow compass. But while our law permitted any writing of a testamentary sort to rank as a will of personalty without any attestation, without even the testator's signature subscribed to it, it must often have been a vexed problem to determine whether a certain writing found among one's papers after his death was or was not to all intents a will and an efficacious disposition of his property.

Even at this day, under the numerous statutes which prescribe attestation but no formal clause of attestation, such questions sometimes occur. Thus, in England or America, a paper amounting to little more than a mere draft upon a certain savings bank in favor of A. B., or some simple order contained in a single sentence, may, if simply witnessed at the side of the drawer's signature by two persons or three (as the local statute prescribes) constitute a will.³ A will need name no executor; it may avoid using such words as "last will and testament"; it may take effect as a partial, rather

¹ *McRee v. Means*, 34 Ala. 364. A paper expressing a wish to give certain sums, and that neither executors nor heirs will object to carrying out this will is imperative. *Carle v. Underhill*, 3 Bradf. Sur. 101. And see *Knox's Estate*, 131 Penn. St. 220.

² But see *Smith, Goods of*, L. R. 1 P. & D. 717, under §§ 285-290 *post*.

³ See 134 Mass. 426; *Cock v. Cooke*, L. R. 1 P. & D. 241; L. R. 2 P. & D. 362.

than total disposition of property; there are no words or phrases essential to the devolution of title under such an instrument.¹

§ 265. **No Testamentary Form Requisite, if there be the Testamentary Intent.** — The fundamental maxim is, that no particular form of written testament can be insisted upon, provided the maker of the instrument intended it to operate only at or after his death, and the instrument be executed with such formalities as local legislation may have imposed. Testamentary intention, in other words, or rather an intention whose effect is to create a testament, entitles the instrument to probate, however inartificial its form, subject only to such restraints as legislation may have seen fit to impose, for the better prevention of fraud and perjury.²

Until within the last half century this doctrine has applied chiefly in favor of wills of personalty; to wills proper, subject to ecclesiastical direction, as contrasted with devises. And in much earlier times greater strictness prevailed in England than during the half century immediately preceding the enactment of 1 Vict. c. 26.³

¹ Byers v. Hoppe, 61 Md. 206.

"There is nothing that requires so little solemnity as the making of a will of personal estate, according to the ecclesiastical laws of this realm; for there is scarcely any paper writing which they will not admit as such." Lord Hardwicke, in *Ross v. Ewer*, 3 Atk. 163. But since the Statute 1 Vict. c. 26 took effect, there is far less force in such a statement, as the text above suggests.

² *Masterman v. Maberly*, 2 Hagg. 248; *Habergham v. Vincent*, 2 Ves. Jr. 231; 1 Wms. Exrs. 104; *Leathers v. Greenacre*, 53 Me. 561; *Brown v. Shand*, 1 McCord, 409; *Mealing v. Pace*, 14 Ga. 596; *High's Case*, 2 Dougl. (Mich.) 515. And see cases below.

³ 1 Wms. Exrs. 104.

There are numerous English decisions, chiefly those of the ecclesiastical

courts, where various kinds of instruments are sustained, as under the circumstances testamentary. As, for instance, a deed of gift. *Thorold v. Thorold*, 1 Phillim. 1; 2 Ves. Sen. 440; *Attorney-General v. Jones*, 3 Price, 368. Or a deed, whether executed by way of deed-poll or indenture. *Habergham v. Vincent*, 2 Ves. Jr. 231; *Shingler v. Pemberton*, 4 Hagg. 356. Or a marriage settlement. *Passmore v. Passmore*, 1 Phillim. 218; 2 Hagg. 554; 3 Hagg. 415; *Thompson v. Browne*, 3 My. & K. 32. Or general instruments expressed after the form of articles of agreement. 1 Mod. 117; 1 Jarm. Wills, 18-23. But see 8 Ir. Eq. 567; *Robinson's Goods*, L. R. 1 P. & D. 385. Or a bond. *Masterman v. Maberly*, 2 Hagg. 235. Or a letter. *Passmore v. Passmore*, 1 Phillim. 218; 2 S. & T. 119, 375; 1 Hagg. 130, 488; *Denny v. Barton*, 2 Phillim. 575. Or a

§ 266. **The Same Subject.**—The effect of such an informal instrument being to give a posthumous destination to the maker's property, any contrary title or designation which he may have given does not prevent the court from treating it as a will.¹ As where words of immediate grant are expressed in the document and yet, on the whole, the intention was that of a future operation upon the signer's death.² And, dispensing as it might with execution and a formal attestation in wills of chattels, our former probate law was led often to treating as a testament what was quite as likely from its face to be nothing more than a memorandum of instructions for drawing one's will, or some other preliminary writing which embodied plans by no means matured at the disposer's death; thus confirming in no slight degree by laxity of con-

promissory note. 2 Hagg. 247. Or a draft on a bank. *Bartholomew v. Henley*, 3 Phillim. 317; 2 Curt. 650. Or the assignment of a bond or indorsement of a note to some party. 2 Hagg. 247; *Chaworth v. Beech*, 4 Ves. 565. Or a memorandum of testamentary intention. *Tapley v. Kent*, 1 Robert. 400.

Many American decisions, especially those not of recent date, are to the same effect. Thus, instruments which are 'in form a deed of gift, and so called, have been admitted to probate, out of regard to the giver's testamentary purpose. *Dunn v. Bank of Mobile*, 2 Ala. 152; *Mosser v. Mosser*, 32 Ala. 551; *Carey v. Dennis*, 13 Md. 1; *Symmes v. Arnold*, 10 Ga. 506; *Johnson v. Yancey*, 20 Geo. 707; *Allison v. Allison*, 4 Hawks. 141; *Ragsdale v. Booker*, 2 Strobb. Eq. 348; *Millican v. Millican*, 24 Tex. 426. So is it with a deed. *Dudley v. Mallery*, 4 Geo. 552; *Evans v. Smith*, 28 Geo. 98; *Gage v. Gage*, 12 N. H. 371; *Frederick's Appeal*, 52 Penn. St. 338; *Ingram v. Porter*, 4 McCord, 198; *Watkins v. Dean*, 10 Yerg. 321. Or letters. *Morrell v. Dickey*, 1 John. Ch. 153; *Leathers v. Greenacre*, 53 Me. 561; 1 Gill & J. 25; *Byers v. Hoppe*, 61 Md. 206;

Cowley v. Knapp, 42 N. J. L. 297. But as to a marriage settlement, see *Michael v. Baker*, 12 Md. 158, where probate was refused. Deeds, intended to operate as such, are not allowed to operate as wills. *Edwards v. Smith*, 38 Miss. 197; *Rice (S. C.) Ch.* 243; *Baltimore v. Williams*, 6 Md. 235; *Cumming v. Cumming*, 3 Ga. 460; 5 Munf. 42; *Boling v. Boling*, 22 Ala. 826; *Skerrett's Estate*, 67 Cal. 585. Nor is a bond of no testamentary purport. *Shields v. Mifflin*, 3 Yeates, 389. Nor a paper of preliminary instructions. *Hocker v. Hocker*, 4 Gratt. 277; *Plater v. Groome*, 3 Md. 134. And various informal writings, letters, or memoranda, have been ruled out from probate, as not constituting wills. *Todd's Will*, 2 W. & S. 145; *Wagner v. M'Donald*, 2 Harr. & J. 346. As for notes, orders, indorsements, etc., see *Hunt v. Hunt*, 4 N. H. 434; 6 Dana, 30; *Plumstead's Appeal*, 4 S. & R. 545.

¹ 1 Jarm. Wills, 18; *Rohrer v. Stehman*, 1 Watts, 442; *Leathers v. Greenacre*, 53 Me. 561.

² *Habergham v. Vincent*, 2 Ves. Jr. 204; *Walker v. Jones*, 23 Ala. 448; *Carey v. Dennis*, 13 Md. 1; *Stevenson v. Huddleson*, 13 B. Mon. 299; *Babb v. Harrison*, 9 Rich. Eq. 111.

struction that very uncertainty which the Statute of Frauds sought to remove from devises.¹

§ 267. **Whether an Instrument is Testamentary or not, where Statutes require an Attestation, etc.** — Under our modern stat-

¹ See 1 Redf. Wills, 168, and notes; 1 Jarm. Wills, 101-104, notes. The presumption of the ecclesiastical courts has been against a paper whose face indicates that it was unfinished; but whenever the character of such a paper is equivocal, parol evidence may be introduced to show whether it was intended as a mere memorandum or a will. 1 Jarm. Wills, 104; 1 Hagg. 75, 661; *Gillow v. Bourne*, 4 Hagg. 192; *Castle v. Torre*, 2 Moore P. C. 154. But it may be shown that the deceased intended the paper in its actual condition to operate as his will, or that he was prevented by involuntary accident from completing it. 1 Jarm. 104. Papers were frequently refused probate where the testator had full opportunity to sign and did not, or attached an attestation clause, which might have been, but was not, subscribed by witnesses; this, however, simply by force of a presumption that the incompleteness in fact signified incomplete intention; for the writing, even as it stood, was adequate as a will in writing to satisfy the requirements of the old law. Slight as the adverse presumption was, it had to be rebutted by some extrinsic evidence that the testator meant it to operate in its subsisting state, before probate could be granted. *Beatty v. Beatty*, 1 Add. 154; *Harris v. Bedford*, 2 Phillim. 177; 1 Jarm. 101. A distinction, however, favorable to probate was taken where the testator had not full opportunity of completing, but was prevented by sudden death, insanity, or other involuntary cause, from performing the concluding act of signature or attestation; though obviously a sudden calamity like this might rather have stopped the decedent in the midst of deliberations and before his testamentary purpose had fully worked out.

Montefiore v. Montefiore, 2 Add. 354; 1 Jarm. 104. As between presumptions and oral proof, informal papers intended as wills, and inchoate or unfinished papers, it may be imagined through what a flood of uncertain litigation the courts wandered until the statute of 1 Vict. c. 26 introduced a stricter necessity for formal execution.

There are numerous American decisions where wills of chattels have been admitted to probate upon similar grounds; no statute requirement being at the time transgressed. Thus in *Watts v. Public Administrator*, 4 Wend. 168; s. c., 1 Paige, 347, where (by reversal of the chancellor's decree) a testamentary paper, found among the papers of the deceased in an iron chest, properly drawn up, as it appeared, by the testator, and with his name at the beginning was held a valid will of chattels, though not authenticated by the testator's signature at the end, nor by the names of witnesses at the blank attestation clause, nor by any other very clear proof that the deceased had intended it as the expression of his full and final testamentary purpose. Other American cases are to the same general effect: namely, that papers may be admitted to probate, with the force of wills of chattels, on proof of extrinsic circumstances to show the *animus testandi*, notwithstanding incompleteness on the face of such an instrument, and the utter omission of signatures either by attesting witnesses or the alleged testator himself; and the English presumptions are applied to such cases. *Witherspoon v. Witherspoon*, 2 McCord, 520; *Hocker v. Hocker*, 4 Gratt. 277; *Robeson v. Kea*, 4 Dev. L. 301. And see § 255, *supra*, as to holograph wills.

utes, which embody the policy of the famous English Wills Act of 1837,¹ much of this former uncertainty as to wills, informal and inchoate, is obviated. Within the narrow sphere still assigned to nuncupative wills, parol evidence to authenticate writings, or to establish wills without any writing, of course avails.² And we are further to remember that in a few of the United States a formal attestation by witnesses is not made indispensable to probate;³ while in various parts of this country holograph wills appear to have found a permanent lodgement;⁴ not, however, in every instance, without more wholesome precautions against error and fraud, than the old ecclesiastical courts of England saw fit to insist upon.

But even in England, as to wills executed since 1837, and in the great majority of American jurisdictions, where like formalities of signature and attestation must now be pursued, doubts may still arise whether a particular instrument ought or ought not to be probated as a will. This is because the law still permits the greatest flexibility of form and expression in documents whose aim is a posthumous disposition of property; and, while requiring a certain number of subscribing witnesses, moreover, leaves the form of attestation itself quite at discretion; for should a statute make it imperative for witnesses to sign an attestation clause as such clauses

¹ Appendix; *supra*, § 252.

² See *c. post*, on this subject.

³ *Supra*, § 256.

⁴ *Supra*, § 255.

Under the Maryland code this was held a valid testament of personal property, which the decedent wrote and signed on the back of a business letter and addressed to A.: "After my death you are to have forty thousand dollars; this you are to have, will or no will; take care of this until my death." *Byers v. Hoppe*, 61 Md. 206, and cases cited. And see *Kelleher v. Kernan*, 60 Md. 440.

In Pennsylvania, too, where subscribing witnesses may be dispensed with, under the peculiar policy of its code, various informal papers are sustained, as testamentary, by the later decisions.

Thus, an instrument after the form of an assignment of a life insurance policy, "to my wife M. after my death, when she can do with it according to her best will, without partiality toward her children." *Schad's Appeal*, 88 Penn. St. 111. And the indorsement of address on a sealed envelope has been taken, together with its contents, consisting of a promissory note and an unaddressed letter, as constituting together a valid testamentary disposition of the note in favor of the party named on the envelope. *Fosselman v. Elder*, 98 Penn. St. 159. A paper in the form of a power of attorney may be admitted on due proof as testamentary. *Rose v. Quick*, 30 Penn. St. 225. See also *Barton's Estate*, 52 Cal. 538.

are usually written (namely, that the testator in their presence signs and declares the instrument as his will), little controversy would remain, though doubtless many intended wills would fail of operation in consequence.

§ 268. **The Same Subject: Late American Cases.**— Thus, to suppose a written instrument drawn up somewhat like a deed or solemn contract; or some writing in the form of a letter, a draft on a bank, or a memorandum. It is signed by the party since deceased; two or three witnesses, the full statute number, have attested by writing their names at the side, as is often done in a deed or indenture. Is that instrument a will or not? It complies with the local statute of wills in all essentials; and yet no layman who reads it over could confidently pronounce it a will, more than a deed or some other kind of writing whose form it follows. Decisions that one might suppose at variance pursue the line of distinction appropriate in such cases.

To mention a few examples from the later reports. In one Georgia case, an instrument, made out in the form of a deed, and yet attested by three witnesses, made a reservation of land to the maker's use during his life, and provided how all his property should go at his death, after his burial expenses and debts were paid. The maker of this instrument kept it while he lived. This, the court held, was a will.¹ A few years later the same court passed upon another instrument, likewise drawn up like a deed, which also reserved to the maker the use of the land for life, and, by the advice of counsel, was attested by three witnesses. In other respects this latter instrument had none of the characteristics of a testament; it warranted the title to the grantee; and the court pronounced it no will at all, but a deed of gift under reservations.² Generally speaking, an instrument in the form of a deed which is executed with testamentary formalities, and conveys all the property that the maker "may die possessed

¹ *Nichols v. Chandler*, 55 Ga. 369. And see 66 Ga. 317; *Robinson v.*

² *Williams v. Tolbert*, 66 Ga. 127. *Schly*, 6 Ga. 515; 51 Ga. 239.

of" is treated in this State as a will, and should be duly presented for probate.¹

In other States, instruments made out in the form of a deed, but well executed for either deed or will, which convey a specified tract of land, or, as the case may be, all of the maker's estate real and personal, or his personalty only, have been pronounced wills and not deeds, because of the true import of the transaction; especially if the instrument was retained by the signer as though revocable, or reference was made to the instrument as a will, or words usual in testaments were employed, or the real intent to be gathered was, that no estate or interest in the property should pass until the maker's death.² For among those devoted to agriculture it is not unusual to purpose a sort of conveyance of the farm in contemplation of death, with a proviso for the maker's support during the rest of his life, and a suspension of the gift to make that support sure. The scope of such a transaction is testamentary, though the maker himself may not be fully aware of it.³

A testament may be made simply for the purpose of appointing an executor and giving him authority to act; and any will of such a tenor which is duly executed and attested, ought to be admitted to probate, though brief and

¹ *Brewer v. Baxter*, 41 Ga. 212.

² *Miller v. Holt*, 68 Mo. 584; *Armstrong v. Armstrong*, 4 Baxt. 357; *Freed v. Clarke*, 80 Penn. St. 171; *Jordan's Administrator*, 65 Ala. 301; *Daniel v. Hill*, 52 Ala. 430; 59 Ala. 349; *Stevenson v. Huddleson*, 13 B. Mon. 299; *Frederick's Appeal*, 52 Penn. St. 338; *Lautenshlager R_e*, 80 Mich. 285.

³ On the other hand an indenture which provides that in consideration of certain services to be performed by A for B during the latter's life, A shall be "the lawful heir of all the land B now owns," and by which B agrees to give most of his personal property presently to A is pronounced not testamentary, but an executory agreement, which upon substantial performance of the condi-

tions confers title upon A according to its tenor. *Evans v. Lauderdale*, 10 Lea, 73. And see *Meck's Appeal*, 97 Penn. St. 313. Nor can instruments having the essential characteristics of deeds be construed into writings testamentary. *Cumming v. Cumming*, 3 Ga. 460; *supra*, § 265, notes. As in the case of an absolute deed of trust with reservation of an interest in the grantor. 3 Ga. 460, 569. Or a deed not executing a power, nor containing a power of revocation, but confirming a will previously made. 6 Md. 235. See *Crain v. Crain*, 21 Tex. 790. Nor is a bond transaction, which absolutely transfers a sum of money, to be deemed testamentary. *Hinkle v. Landis*, 131 Penn. St 573.

informal in expression.¹ So is it with an instrument which leaves the testator's property "for distribution under the laws of the State."² Orders on savings banks, duly executed, have been upheld as testamentary upon slight phraseology to that effect.³ And so with promissory notes.⁴

Notwithstanding English precedents, we may regard it as the settled doctrine of most American States, that a will must be perfect in the testamentary sense, and designed as something final in shape, and not preliminary, or it cannot take effect as a will; and this, in conformity to the American policy, which prescribes certain formalities of execution as indispensable, including a due attestation by witnesses. Mere drafts or minutes of wills are therefore inadmissible to probate.⁵ But some of our earlier decisions, made under statutes less explicit, and possibly later ones, too, in States whose legislation still favors holograph wills, and otherwise departs from the general policy, appear to conform to a laxer principle.⁶ A paper drawn up as a memorandum of instructions and then duly executed and attested as a will, would of course operate in its final character because of a corresponding change of purpose which the testator had properly carried out.

§ 269. **The Same Subject: Late English Cases.** — There are late English cases which present similar points of inquiry, under the operation of the new Wills Act. Thus, where a person on his death-bed executed, with all the formalities prescribed for a will, a paper in the form of a bill of exchange, the instrument was held entitled to probate; and under the

¹ *Barber v. Barber*, 17 Hun (N. Y.) 72.

² *Lucas v. Parsons*, 24 Ga. 640.

For other late instances of valid wills, brief and rather informal in expression, see *Wood, Matter of*, 36 Cal. 75; *Hall v. Bragg*, 28 Ga. 330. An instrument duly executed and attested, in the following words, "I do hereby will all I have to my beloved wife, Jane, for her to have and hold forever," is a sufficient will to pass the entire real and personal

estate of the testator to the devisee. *Clingan v. Micheltree*, 31 Penn. St. 25.

³ 134 Mass. 426. And see English cases cited *post*.

⁴ *Cover v. Stem*, 67 Md. 449.

⁵ *Vernam v. Spencer*, 3 Bradf. Sur. 16; *Rooff's Appeal*, 26 Penn. St. 219; *Aurand v. Wilt*, 9 Penn. St. 54; *Lungren v. Swartzwelder*, 44 Md. 482; *Hart v. Rust*, 46 Tex. 556.

⁶ See *Boofter v. Rogers*, 9 Gill, 44.

circumstances it served as a codicil to his former will.¹ A duly executed paper of this tenor, "I wish my sister to have my bank-book for her own use," was held testamentary, upon satisfactory proof that the deceased meant it to operate as a posthumous disposition and not as an immediate gift.² And there are other cases where papers in the tenor of a gift or transfer of a fund, properly signed and witnessed, are pronounced testamentary, upon collateral or intrinsic proof that such was their design.³

A deed-poll, executed before two witnesses with the formality of a will, has been admitted to probate on evidence showing that it was only to take effect at the maker's death.⁴ So have writings in the form of a letter, duly attested, where the intention shown was posthumous, even though the words of gift were not stated in the future tense.⁵ Also instructions for a will which have been duly executed as final.⁶ Letters sealed and directed to a person, which contain promissory notes, are held to be in effect a legacy; and if not duly attested in accordance with the statute, they are inoperative.⁷

Where an instrument made out by a person abroad in the form of a power of attorney, but properly executed as a will, empowered another to collect the rents of his lands and provided also for the disposition of the property in case of his own death before returning home; this was held a good will of the land.⁸

§ 270. **Whether One Instrument may be partly a Deed or Contract and partly a Will.** — There appears no legal objection to regarding the same instrument as partly a deed or contract and partly a will, partly for present and partly for posthu-

¹ *Jones v. Nicholay*, 2 Rob. 288.

² *Cock v. Cooke*, L. R. 1 P. & D. 241.

³ *Coles R.*, L. R. 2 P. & D. 362; *Robertson v. Smith*, L. R. 2 P. & D. 43; *Marsden R.*, 1 S. & T. 542.

⁴ *Morgan's Goods*, L. R. 1 P. & D.

214. Revocable deeds-poll in which a power of appointment was exercised

were admitted to probate as testamentary instruments in *Milnes v. Foden*, 15 P. D. 105.

⁵ *Coles, Goods of*, 9 L. R. 2 P. & D. 362; *Mundy's Goods*, 2 S. & T. 119.

⁶ *Fisher's Goods*, 20 L. T. 684.

⁷ *Gough v. Findon*, 7 Ex. 48.

⁸ *Doe v. Cross*, 8 Q. B. 714. And see *Rose v. Quick*, 30 Penn. St. 225.

mous operation, if the maker chose to combine these purposes. As where one, going on a journey, embraces a power of attorney to manage his property and a testament disposing of it in case of his death in the same duly attested instrument.¹ To probate the testamentary part of the document as a will in such a case is no violation of the maker's intent, but rather a sanction of it. It rarely happens, however, that a testamentary purpose is announced so awkwardly; and the common presumption being, that an instrument was or was not intended to stand *per se* as a will, the court, if doubt exists, must make its choice. In this latter sense alone should the *dictum* be understood that the same paper cannot operate both as a will and a deed.² For notwithstanding certain provisions contained in a testamentary paper are intended to operate as a contract *inter vivos*, the instrument is none the less a will in regard to its other provisions.³ But, on the other hand, an instrument intended as a deed or contract *inter vivos* cannot be treated as a will, even though worthless and inoperative (as, for instance, for want of delivery) in the other sense.⁴

§ 271. **A Will is to be distinguished from a Gift Causa Mortis.**—An intended will should be distinguished from an intended gift *causa mortis* of some chattel, which latter involves a delivery.⁵ Such a document, invalid for want of

¹ Doe v. Cross, 8 Q. B. 714. Barker's Goods, P. 251 (1891). And see Dawson v. Dawson, 2 Strobh. Eq. 34; Robinson v. Schly, 6 Ga. 515; Taylor v. Kelly, 31 Ala. 59; Reed v. Hazleton, 37 Kan. 321.

² Thompson v. Thompson, 19 Ala. 59; Robinson *Re*, L. R. 1 P. & D. 384. A paper may be testamentary in design as to part of the property and so admissible to probate, but incomplete in design as to another part and so far inoperative. Devecmon v. Devecmon, 43 Md. 335.

³ Taylor v. Kelly, 31 Ala. 59.

⁴ Dawson v. Dawson, 2 Strobh. Eq.

34; Edwards v. Smith, 35 Miss. 197; Skerrett's Estate, 67 Cal. 585.

⁵ Basket v. Hassell, 108 U. S. 267; 2 Schoul. Pers. Prop. §§ 135-198. As to checks, promissory notes, etc., passed over by way of gifts *causa mortis* without indorsement, see Veal v. Veal, 27 Beav. 303; Clement v. Cheeseman, 27 Ch. D. 631; 2 Sch. Pers. Prop. §§ 167, 197.

It is a curious circumstance that while our modern statutes tend to restrain or abolish the making of nuncupative or oral wills, they freely permit gifts *causa mortis* which are of essentially the same character and equally liable to objection.

proper attestation, cannot be sustained as a gift *causa mortis*, nor as an immediate assignment.¹

§ 272. **The Test in Doubtful Cases as between a Will and Some Other Instrument.** — Now, to consider the true test in a doubtful case, as to whether the particular writing be really a will or some other instrument. It is the *animus testandi* in general which makes any instrument a will, or *vice versa*.² And it is laid down in some cases that an instrument cannot be allowed as a will if, at the time of execution, the deceased did not intend to make his will, nor know that he was making it.³ This statement proves usually accurate; but in practice, and aside from legislation which requires one to declare it his will before witnesses, the criterion does not always serve. To take, for instance, that class of cases where the farmer makes a conveyance of his land in form, but with the idea of securing his sure support out of the property until death;⁴ here it is often hard to discover whether, technically speaking, the disposition was testamentary or not; and in all probability the disposer himself had no clear opinion on that point. But the transaction itself is seen to be testamentary in character, or the reverse; and as this is the transaction the maker intended, his instrument is declared a will or a deed accordingly. Even though he could be shown to have intended it as a will and attested it as such, this would not avail as against the actual transaction; and so *vice versa*.⁵ In other words, to adopt the language of an eminent English judge, “whether the maker would have called this a deed or a will is one question; whether it shall operate as a deed or a will is a distinct question that is to be governed by the provisions in the instrument.”⁶

¹ Hughes *Re*, W. N. (1888) 163.

² Lyles *v.* Lyles, 2 Nott. & M. 531.

³ Swett *v.* Boardman, 1 Mass. 258;
Combs *v.* Jolly, 3 N. J. Eq. 625.

⁴ *Supra*, § 268.

⁵ Whether a writing is a will, depends upon its contents, and not upon any declaration of the maker that it is a

will when he executes it. Patterson *v.* English, 71 Penn. St. 454.

⁶ Buller, J., in *Habergam v. Vincent*, 2 Ves. Jr. 231.

It is perhaps enough to say, that if the maker intended a disposition which was in legal effect testamentary, that disposition will stand as testamentary.

In short, to determine the true character of a doubtful instrument we must read the intention of the maker by the light of the transaction itself, as shown by the provisions of the instrument and all the surrounding circumstances. If the intention be to convey in effect a present estate or interest upon the execution of the instrument; by which is meant, not necessarily a present interest in possession, since any grantor might reserve to himself or create for another's benefit a life estate, by way of precedence; the instrument is a deed and not a will. But to be a will the estate must accrue and take effect only after the maker's death; and if such be the operation, the instrument is not a deed.¹ No paper can be deemed testamentary and entitled to probate as a will, unless the benefit it confers is postponed to the death of the party who confers it.² Nor can that be pronounced a testamentary document although suitably witnessed, which unequivocally declares on its face that it is not meant as a will.³

§ 273. **The Same Subject.**—The form of the instrument in controversy will usually determine its true character, unless a contrary intention appears on its face.⁴ But collateral evidence is freely admitted where the instrument itself is silent or equivocal, in order to show whether or not a testamentary disposition was actually intended.⁵ The facts of execution and delivery, the declarations of the maker at the time, and all the surrounding circumstances of the transaction, together with the instrument itself, may be considered in such a connection.⁶ And notwithstanding the use of technical words

¹ *Habergham v. Vincent*, 2 Ves. Jr. 231; *Williams v. Tolbert*, 66 Ga. 127; *Morgan's Goods*, L. R. 1 P. & D. 214; *Reed v. Hazleton*, 37 Kan. 321.

² Hence a paper which directs a benefit to be conferred *inter vivos* without express or implied reference to the maker's death, cannot be established as a will. 1 Wms. Exrs. 107; *Glynn v. Oglander*, 2 Hagg. 428; 3 Hagg. 218; 4 Hagg. 359.

³ *Ferguson-Davie v. Ferguson-Davie*, 15 P. D. 109. Here the paper, made

subsequently to the will, distinctly stated: "This is not meant as a legal will, but as guide;" and the court refused to consider it a codicil. Cf. § 275.

⁴ *Ib.*; *Miller v. Holt*, 68 Mo. 584; *Armstrong v. Armstrong*, 4 Baxt. 357.

⁵ *Jones v. Nicholay*, 2 Robert. 292; 3 Sw. & Tr. 586; *Cock v. Cooke*, L. R. 1 P. & D. 241; *Robertson v. Smith*, L. R. 2 P. & D. 43; *Walk. 520*; *Gage v. Gage*, 12 N. H. 371; *Sharp v. Hall*, 86 Ala. 110.

⁶ *Ib.*

and expressions, which might lead to a different conclusion, the paper will be pronounced what, upon the whole, the true scope and bearing of its contents entitle it to be considered.¹ On the presumption that all was done rightly, probate has been granted of a will executed in the form of a deed, even though the attesting witnesses had no precise recollection of the circumstances of the execution.² And a power of attorney may be wide enough in scope to have a testamentary character.³

§ 274. Posthumous and Ambulatory or Revocable Character of a Will.—The great criterion, then, of a testamentary disposition is, that by intendment it takes effect only at the death of the maker, vesting no earlier interest in the beneficiary. And the chief and usual incident of such a disposition is, that until the maker's death, it continues ambulatory or revocable at his discretion. A transaction in the nature of an agreement upon mutual consideration which is made irrevocable and binding upon the person who stipulates what shall be done in the event of his death, cannot in general be held to involve a will.⁴ But there may be a will, given upon some consideration by way of an independent covenant, for the breach of which even third parties might rightfully sue.⁵ Where the consideration kept in view is service or the testator's life support from the intended beneficiary, his own power to revoke the will (or, indeed, to make no will at all, or a different sort of one) is his constant security.⁶ The modern equity doctrine of mutual or joint wills, however, or of a contract upon good consideration to execute some particular will, introduces a new refinement, by way of eliminat-

¹ 1 Jarm. Wills, 18; Thompson v. Johnson, 19 Ala. 59; Hamilton v. Peace, 2 Desaus. 92; Armstrong v. Armstrong, 4 Baxt. 357.

² Colyer's Goods, 14 P. D. 48.

³ Barker's Goods, P. 251 (1891); Doe v. Cross, 8 Q. B. 714.

⁴ Meck's Appeal, 97 Penn. St. 313.

An antenuptial marriage settlement rendered irrevocable on the marriage is not a testamentary paper. 8 Ir. Eq.

567. Nor is an instrument by way of lease with provision as to applying rents in the event of the lessor's death; this, too, is irrevocable. Robinson's Goods, L. R. 1 P. & D. 384. A gave a writing to his bankers which he called "an assignment." But it was in its purport a will. Comer v. Comer, 120 Ill. 425.

⁵ Armstrong v. Armstrong, 4 Baxt. 357.

⁶ See Miller v. Holt, 68 Mo. 584.

ing this revocable or ambulatory incident, otherwise universal ; which subject we shall discuss in place hereafter.¹ The idea that the maker intended à will and not a transfer *inter vivos*, is strengthened by the circumstance that he kept the doubtful instrument under his own control, thus suspending delivery until his death and making it easy to revoke the disposition.²

§ 275. **What a Testator executes as his Will, should so operate, notwithstanding his Mistake of Law.**—The instrument which a testator executes finally as his will, should so operate, if all legal formalities have been actually complied with, notwithstanding his mistaken belief that other formalities were requisite.³ As where one makes what is a will, in substance, but expresses therein an intention of making later a more formal one.⁴

§ 276. **Writings, otherwise intended by the Maker, how far upheld as Testamentary by the Courts.**—While informal and unattested writings were upheld in England as wills, and a man was hardly thought to deserve a respectable name after death unless he left some will behind him disposing of his property, instruments not really meant to be wills were allowed so to operate, if they could not operate in the character intended. Why ecclesiastical courts accorded this favor was, because they exercised a flexible discretion in the premises ; and their argument was that the maker, having died without making any other disposition of his personalty, his

¹ See Part V., *post*, Joint or Mutual Wills, etc.

² See *Nichols v. Chandler*, 55 Ga. 369.

³ This principle requires, as we presume, that the testator executed the paper with a final testamentary purpose, and not as a mere preliminary or deliberative writing. See *Fisher's Goods*, 20 L. T. 684. The rule of the text is supported by *Toebbe v. Williams*, 80 Ky. 661, where, however, the facts as reported appear hardly satisfactory. A. executed a holograph will, supposing a

witness clause necessary to complete it, and handed it for suggestions to his lawyer, who made slight changes and returned it. Holograph wills in that State require no witnesses to the testator's signature ; and the court admitted the will to probate, treating the changes made by the lawyer as no part of it. The opinion states, however, that the will was wholly written and signed by the testator with the intent that it should be his will.

⁴ *Beebe R.*, 6 Dem. 43.

purpose could only be effected by treating the paper as testamentary. Hence, if the purpose disclosed was to make a disposition of one's property after his death, the instrument was treated as a will, though actually meant to operate as a settlement, or a deed of gift, or a bond.¹ Some American cases proceed upon the same view.² "But no case," observes Mr. Williams, "has gone the length of deciding, that because an instrument cannot operate in the form given to it, it *must* operate as a will;"³ and that eminent writer's inclination is evidently to conform this theory to the safer principle we have already adduced, namely, that the true intent and scope of the instrument, whatever the form or the maker's apprehension or misapprehension as to its legal effect, shall sufficiently conclude it a testament and give it the testamentary operation which legally belongs to it.⁴ Under the prevalent policy of our day, which insists upon formal signature and attestation, and treats intestacy as no such serious misfortune, courts will hardly venture beyond the shadow of that principle.

§ 277. **Extrinsic Evidence not Admissible to dispute the Plain Tenor of the Instrument; Effect of Doubt, etc.**—In the cases we have thus considered, where extrinsic and parol evidence was admitted to show whether an instrument was or was not testamentary in its true intent, a doubt was suggested on the face of the instrument. Where, in both form and substance, the writing is plainly a will, and execution with all the prescribed formalities can be shown, its obvious intent and scope cannot be contradicted or controlled in operating by parol and extrinsic evidence.⁵ And if on the other hand, an instrument expressed and executed as a deed be delivered *inter vivos* to the party who on its face appeared entitled to

¹ *Masterman v. Maberly*, 2 Hagg. 247. See *Morgan's Goods*, L. R. 1 P. & D. 214. a deed. *Edwards v. Smith*, 35 Miss. 197.

² *Kelleher v. Kernan*, 60 Md. 440.

³ 1 Wms. Exrs. 106. An instrument intended to operate as a deed cannot take effect as a will, though invalid as

⁴ *Supra*, § 270; 15 P. D. 109.

⁵ *Whyte v. Pollok*, 7 App. Cas. 400; *Sewell v. Slingluff*, 57 Md. 537; *English, Goods of*, 3 S. & T. 586.

it, no agreement in conflict with its plain tenor can be proved after the maker's death, to show that its operation was testamentary or dependent on some condition subsequent.¹

Where, however, something to suggest a doubt as to whether the instrument was intended to be testamentary or not appears on the face of it, extrinsic evidence as to the circumstances, besides the fact of execution, is admissible, so as to enable the court to determine the true character of that instrument.² This does not (observes a recent case) throw upon the propounder a burden of proof which he fails to satisfy if the evidence does not confirm the instrument as a will; but the natural consequence is, that the court will fall back upon the instrument itself, and apply sound principles of construction to arrive at its real character, just as it would in interpreting any other document.³

§ 277 a. Doubtful Writing, if pronounced a Will, fails unless formally executed.—It is obvious that such a writing of doubtful character as we have considered must fail of enforcement altogether if pronounced a will, unless executed with all the statute formalities which a testament require.⁴

§ 278. Wills made in Jest or without the Animus Testandi, etc.—Wills, to be valid, require, of course, the genuine *animus testandi*; to the extent, at least, of intending a disposition whose legal effect the court may safely pronounce testamentary. The mind should act freely and understandingly to this intent; and therefore it may be shown in evidence to vitiate an alleged will, not only that it was the offspring of an unsound mind, of essential error, or of coercion, but that it was written in jest, or without any idea of making an operative will.⁵ Such jests, however, are unsafe ones; and parol

¹ Black v. Shreeve, 2 Beasl. 458; Davy, Goods of, 1 S. & T. 262.

² Whyte v. Pollok, 7 App. Cas. 400.

³ *Ib.* per Lord Selborne.

⁴ Cover v. Stem, 67 Md. 449; Comer v. Comer, 120 Ill. 421. And see as to articles of copartnership of a testamen-

tary character, McKennon v. McKennon, 46 Fed. 713.

⁵ Nichols v. Nichols, 2 Phillim. 180; Lister v. Smith, 3 Sw. & Tr. 282; Swett v. Boardman, 1 Mass. 258. And see § 216.

evidence tending to prove that a paper expressed and executed with all solemn formalities as a will was not so intended, or was only to operate under certain reservations not disclosed on its face, is very little encouraged by authority.¹

§ 279. **Regular Papers imply the Animus Testandi ; otherwise with Papers which are not on their Face Testamentary.** — A regular paper regularly executed speaks for itself, and the *animus testandi* is naturally inferred. But papers which are not clearly on their face of a testamentary character, even though signed and attested, require to have the *animus testandi* shown to the satisfaction of the court.² Any instrument manifestly executed as a will and testamentary in character is to be admitted to probate without considering its peculiar legal effect.³

§ 280. **Several Papers may be probated together as constituting a Will.** — It is not essential that the last will of a testator be expressed in a single instrument. The instance of a will with several codicils is a familiar one in point. And there may be several papers of different natures and forms, constituting a will when taken together ;⁴ not, however, in these times, unless the local statute prescribing a formal signature and attestation be duly complied with.⁵

§ 281. **Instruments Incorporated in the Will and Documents Extraneous.** — It is held, moreover, in various instances, that if a testator refers in his duly executed and attested will to

¹ See *Sewell v. Slingsuff*, 57 Md. 537, 547.

² *Thorncroft v. Lashmar*, 2 Sw. & Tr. 479 ; *Whyte v. Pollok*, 7 App. Cas. 400.

³ *Taylor v. D'Egville*, 3 Hagg. 206 ; *Mundy, Goods of*, 2 S. & T. 119.

⁴ 1 Wms. Exrs. 107 ; *Morgan's Goods*, L. R. 1 P. & D. 323 ; *Sandford v. Vaughan*, 1 Phillim. 39 ; *Hitchings v. Wood*, 2 Moore P. C. 355 ; 4 S. & T. 23 ; *Masterman v. Maberly*, 2 Hagg. 235 ; *Phelps v. Robbins*, 40 Conn. 250 ;

Wikoff's Appeal, 15 Penn. St. 281 ; 1 Tuck. Sur. 205 ; 1 Bradf. Sur. 114.

⁵ A former will absolutely and fully revoked by a later one ought to constitute no part of the probate ; but such reference in the later to the former will as makes it only *pro tanto* a revocation, entitles the two papers to probate as containing together the last will. Cf. *Sinclair's Goods*, 3 Curt. 746 ; and *Duff's Goods*, 4 Notes of Cas. 474 ; 1 Wms. Exrs. 97 ; Part IV., *post*.

another paper which has already been written out, clearly and distinctly identifying and describing it, so that it may safely be incorporated in so solemn a disposition, that paper should be probated as part of the will itself. But a later or even a contemporaneous writing, having the character of a mere letter of instructions to one's executors, and not being executed and attested as the law requires, can have no testamentary operation, and should not be admitted to probate. And, in general, an extraneous unattested writing, to be incorporated with the will itself, should be reasonably identified by reference as part of it and as existing when the will was executed.¹

The modern English and American rule on this point is succinctly stated in a Massachusetts case. "If a will, executed and witnessed as required by statute, incorporates in itself by reference any document or paper not so executed and witnessed, whether the paper referred to be in the form of a will or codicil, or of a deed or indenture, or of a mere list or memorandum, the paper so referred to, if it was in existence at the time of the execution of the will, and is identified by clear and satisfactory proof, as the paper referred to therein, takes effect as part of the will and should be admitted to probate as such."² In conformity with such

¹ *Habergham v. Vincent*, 2 Ves. Jr. 204; *Singleton v. Tomlinson*, 3 App. Cas. 404; *Sibthorp, Goods of*, L. R. 1 P. & D. 106; *Bizzey v. Flight*, 3 Ch. D. 269; *Lucas v. Brooks*, 18 Wall. 436; *Newton v. Seaman's Friend Society*, 130 Mass. 91; 15 Hun, 410; *Zimmerman v. Zimmerman*, 23 Penn. St. 275; *Baker's Appeal*, 107 Penn. St. 381; *Pollock v. Greassell*, 2 Gratt. 439; *Tonnele v. Hall*, 4 Comst. 140; *Beall v. Cunningham*, 3 B. Mon. 390; 1 Wms. Exrs. 97, and cases cited; *Brown v. Clark*, 77 N. Y. 369; 3 Rich. Eq. 305; 14 Mo. 587; *Chambers v. McDaniel*, 6 Ired. 226; 117 Penn. St. 238.

² *Gray, C. J.*, in *Newton v. Seaman's Friend Society*, 130 Mass. 91. The instrument is thus considered as identified

with and forming part of the will itself, in the same manner as if repeated *totidem verbis* in the will itself. 3 Curt. 468, 493. But to incorporate a document in the probate of a will, three things are necessary: (1) that the will should refer to the document as then in existence; (2) proof that the document propounded was in fact written before the will was made; and (3) proof of the identity of such document with that referred to in the will. *Kehol, Goods of*, 13 L. R. Ir. 13. And see *Singleton v. Tomlinson*, 3 App. Cas. 404.

Williams considers the state of the English law as very unsatisfactory on this point, where the document referred to is not *per se* testamentary, especially

a doctrine, a will which was void for want of proper attestation, has been validated by a subsequent codicil properly attested, which sufficiently refers to and embraces it.¹

As to a paper not actually in existence, but hereafter to be prepared and executed, no reference in the existing will can give it any valid testamentary effect, independently of its own proper execution as a will in conformity with the statute. Hence, the testator cannot reserve a power to dispose of property at a future time by what is tantamount to a will informally executed.² Indeed, the written reference in the will to a paper as something to be afterwards prepared, sufficiently debars that paper from being legally incorporated with it; for parol evidence of the time of preparation is held inadmissible to contradict such reference.³ And in some of our States, the courts are very reluctant to admit as wills any extraneous unattested paper whose purport is to dispose, and not merely to explain, describe, or arrange the details under the formal instrument.⁴ A testator cannot be too scrupulous about having his will in final and complete shape before the execution takes place, and avoiding all amendments and additions afterwards without the full solemnities.⁵

in cases where the paper is in the hands of another party, who cannot be forced to produce it. 1 Wms. Exrs. 97, note; *Sheldon v. Sheldon*, 1 Robert. 81; *Astor, Goods of*, 1 P. Div. 170. The probate court in such cases exercises discretion according to the circumstances. *Sibthorp, Goods of*, L. R. 1 P. & D. 106.

¹ *Murfield's Will*, 74 Iowa, 479; § 448, *post*. Cf. 83 Ky. 584.

² *Johanson v. Ball*, 5 De G. & Sm. 85; *Langdon v. Astor*, 3 Duer, 477; s. c., 16 N. Y. 9; *Thayer v. Wellington*, 9 Allen, 283; *Croker v. Lord Hertford*, 4 Moore P. C. 339; 3 Curt. 468; *Grabill v. Barr*, 5 Penn. St. 441.

³ *Sunderland &c*, L. R. 1 P. & D. 198. The reference must be such that, with the assistance of parol evidence when necessary and properly admissible, the connection may be clearly estab-

lished between the will and the existing paper.

If a will refers to a paper as afterwards to be executed, a later codicil making no reference back cannot suffice to incorporate such paper. *Matthias, Goods of*, 3 S. & T. 100; 1 S. & T. 36.

⁴ *Phelps v. Robbins*, 40 Conn. 250; *Thompson v. Quimby*, 2 Bradf. 449. This last restriction is, however, opposed to the general current of authority.

Where a will, otherwise complete, refers to a schedule as annexed for the disposition of certain assets, which is not annexed, the will is good *pro tanto*. *Thompson v. Quimby*, 2 Bradf. 449. And see § 283.

⁵ In a recent New York case the will had been duly executed as the law required, after which the testator told the draftsman about some other articles to

§ 282. **The Same Subject: Parol Evidence, how far Admissible; Burden of Proof.**—Parol evidence is admissible, in case of doubt, to identify the reference made in a duly executed will as to other attested or unattested papers already existing, so as to incorporate all together in the probate. To use the language of Lord Kingsdown in an English privy council case on this subject: "The result of the authorities, both before and since the late act (1 Vict. c. 26) appears to be, that where there is a reference in a duly executed testamentary instrument to another testamentary instrument, by such terms as to make it capable of identification, it is necessarily a subject for parol evidence; and that when the parol evidence sufficiently proves that, in the existing circumstances, there is no doubt as to the instrument, it is no objection to it that, by possibility, circumstances might have existed in which the instrument referred to could not have been identified."¹ But, while parol evidence may thus identify, it should not be admitted to contradict the reference thus made in the former will;² nor to incorporate where no reference is made at all.³

In general, the burden of establishing the existence and identity of an extraneous paper as part of the will rests upon the party who seeks to get such paper admitted.⁴

be bequeathed. The draftsman wrote the directions on a slip of paper, and pasted it upon the will. There was no further execution or publication. The court held that the will should be admitted to probate with these written directions excluded. 6 Dem. 262. A testator sometimes shows a similar inadvertence in altering clauses in his executed will with a pen, or appending later written directions which ought to have been expressed by a properly executed codicil.

¹ *Allen v. Maddock*, 11 Moore, P. C. 427, 461; 1 Wms. Exrs. 100, citing various English decisions made in accordance; 1 Sw. & Tr. 250, 508; 2 Sw. & Tr. 478; 3 Sw. & Tr. 6. And see *Daniels, Goods of*, 8 P. D. 14.

² *Sunderland Re*, L. R. 1 P. & D. 198.

Reference may be made to other persons' wills or other instruments in so general a manner, as by way of explaining the testator's reasons for his disposition, that such extraneous papers could not fairly be pronounced any part of the will in controversy. See *Myrick, Prob.* 205. An annulled will thus referred to need not be embodied in the probate. *Ouchterlong, Goods of*, 3 S. & T. 175.

³ *Watkins, Goods of*, L. R. 1 P. D. 19; L. R. 1 P. D. 198.

⁴ *Singleton v. Tomlinson*, 3 App. Cas. 404.

§ 283. **Reference of Will to a Lost or Inaccessible Will or Writing.**—Where a will is lost or missing, at the testator's death, it is presumed to have been revoked by him during life; but this presumption may be overcome by proof to the contrary.¹ So, too, where one's will refers to a memorandum which cannot be found upon his decease, the will may take effect without it; either on the presumption that the testator destroyed it with the intention of revoking, or because an apparent testamentary disposition is not to be disappointed because other dispositions are unknown by reason of a lost paper.² But the presumption of intended revocation and destruction by the testator being overcome, secondary proof of contents may, we apprehend, be supplied.³ Where inaccessible papers are referred to, the court deals with the difficulty as it may, while sustaining the will.⁴

§ 284. **Will may be written on Several Sheets incorporated together.**—A will may, of course, be written on several sheets of paper incorporated together in sense as one instrument.⁵ And, unless the local statute provides differently, the will is well signed and attested on the last sheet alone, provided the execution was *bona fide* and meant to cover the whole.⁶

The presumption is that papers bound or fastened together, coherent in sense, and constituting the will as found after the testator's death, were so bound or fastened and constituted the will when it was executed and attested.⁷

¹ Schoul. Exrs. & Adms. § 84.

² Dickinson v. Stidolph, 11 C. B. N. S. 341; Wood v. Sawyer, Phill. N. C. 251.

³ See as to probate of a codicil without the missing will, where the codicil stood independently of it, Greig Re, L. R. 1 P. & D. 72; Schoul. Exrs. & Adms. § 84.

As to comparing papers together, in such cases, to ascertain their true interpretation, see Jordan v. Jordan, 65 Ala. 301.

⁴ Schoul. Exrs. & Adms. § 84.

⁵ The different parts of a will need not be physically connected, provided

they are connected by their internal sense or by a coherence and adaptation of parts. Wikoff's Appeal, 15 Penn. St. 281; 47 Hun (N. Y.) 127.

⁶ See 3 Burr. 1773; Marsh v. Marsh, 1 Sw. & Tr. 528; Dea. & Sw. 7; Jones v. Habersham, 63 Ga. 146; chapters *post* as to signature and attestation.

⁷ Rees v. Rees, L. R. 3 P. & D. 84. Here a will had been engrossed on fifteen brief sheets of paper consecutively numbered, with others added. On the testator's death, it was found that the original fourth sheet had been removed, and placed loose in his desk, and that the

§ 285. **Wills Conditional or Contingent.**—Those familiar with testamentary causes are well aware that provisions under a will are liable to turn out in one way or another, contrary often to expectation, according to conditions, express or implied, with which the gift is found coupled; and that predecease and various other contingencies may cause a testamentary disposition to operate quite differently from what the testator himself had more particularly in view. Variation, under given circumstances, may be the result of law in one case and of the testator's own prevision in another. Wills, therefore, as to the details of testamentary disposition, may operate in effect subject to conditions or contingencies in every variety. But now arises the question as to subjecting the will itself, the disposition as a whole, to some condition or contingency, which shall control or prevent its operation altogether, so that the testator may have made the will understanding that he might die testate or intestate.

Wills may be conditional, that is to say, made dependent upon the happening of some specified contingency for testamentary operation. If the condition is of partial application simply, the will should be admitted to probate, and the effect of the condition upon a particular devise or legacy treated as matter of construction afterwards. But if the condition is one that strikes into the essence of the whole will, affecting its status for probate and a valid operation, the main point to determine is, whether so sweeping an effect was really intended. For one may state a contingency that he has in mind as the inducement for making his will, by way of narrative, so to speak, or he may, on the contrary, state it as the condition on which the will is to become operative. The question is, which he intended; and the inclination, in case of doubt, should, we hold, be to the former and less injurious and impolitic conclusion.

§ 286. **The Same Subject.**—There seems no reason upon principle why an instrument cannot be made which shall take

original seventeenth sheet had been substituted for it. The several sheets of the will were found tied together with tape. It was held that these facts did not overcome the presumption that the will had been executed as thus bound together.

effect as a will, on the happening of a particular contingency named in it; not the usual simple contingency of the testator's death, but his death after a certain manner, or at or before a particular date, or during some special season of risk, or in case he shall or shall not leave such an estate or such persons surviving him. But how rarely is it to be supposed that a testator means that the will which he leaves at his death uncanceled was only meant to operate if he died at some particular time or by some stated mode. And as for conditions which have the amount of estate or the survivorship of certain other persons in view, how natural is it that these should have been embraced within the scope of disposition under a will which of itself disposes.

Admitting, nevertheless, that a will may be drawn up and executed to operate only as such upon a stated contingency, "there are two points," says Hoar, J., "to be settled before a will can be rejected from probate on the ground that it is a conditional will, and that the condition has failed: (1) whether the intention of the testator is to make the validity of the will dependent on the condition, or merely to state the circumstances which lead him to make a testamentary provision; (2) if the language clearly imports a condition, whether it applies to and affects the whole will, or only some parts of it."¹ For a contingent part of a will, we should observe, is not *per se* a contingent will.

§ 287. **The Same Subject: English Cases.**—Of English cases decided before the statute 1 Vict. c. 26 went into effect, a brief citation is sufficient. But we may observe that Lord Hardwicke set the early example of treating a will as void through the failure of a contingency upon which it appeared to depend;² while the later decisions showed a more

¹ Hoar, J., in *Damon v. Damon*, 8 Allen, 192. See also Lindsay, *Ex parte*, 2 Bradf. Sur. 204; 1 Redf. Wills, 177.

² *Parsons v. Lanoe*, 1 Ves. Sen. 190; s. c., Ambl. 557. This case was decided, we should observe, as involving a will of real estate, to which the Statute of 195.

Frauds properly applied, rendering due formalities of execution necessary. The report of this case is fragmentary in each report, and it is best to take the two together, that in Ambler being preferable. See Hoar, J., in 8 Allen,

cautious inclination.¹ Under the new Wills Act, however, extrinsic evidence as to the testator's intention and his adherence to the will despite the condition is less easily applied than formerly; the court confining its attention rather to the language used in a written instrument executed with due solemnities. Hence, a will expressed to take effect if the testator should die on a stated voyage, or before his return from a particular journey, has been held inoperative; the testator having returned in safety, and died long after under circumstances quite different, so that the contingency stated in the will never happened.² And here, as in the case before Lord Hardwicke, the court ruled out evidence that notwithstanding his return, the testator had actually recognized the will as valid until he died; because this would be to set up the will by parol, while under the statute a strict republication became indispensable, as in other wills once ceasing to operate.³

But where a will, written as though conditional upon a long journey, is re-executed and duly witnessed after the testator's safe return, the condition ceases, and the will may fully operate by remaining uncanceled; and such, too, is the practical consequence when the instrument was properly executed for the first time when the journey was over.⁴ In several late cases, moreover, the court liberally inclines to admit such wills to probate, where it may; either on the ground that the words claimed to import a condition merely explained the inducement to the will, or in order that the force and effect of a doubtful condition may be determined by construction afterwards. As where a will made in Africa commenced: "In the event of my death whilst serving in this horrid climate, or any accident happening to me."⁵ Or where the

¹ *Barton v. Collingwood*, 4 Hagg. 176; *Bateman v. Pennington*, 3 Moore, P. C. 223; *Strauss v. Schmidt*, 3 Phillim. 209; *Forbes v. Gordon*, 3 Phillim. 625; 2 Phillim. 294; 1 Wms. Exrs. 189. These decisions of the ecclesiastical courts relate to wills of personalty, which were formerly good without a solemn execution.

² *Winn, Goods of*, 2 Sw. & Tr. 147; *Roberts v. Roberts*, 2 Sw. & Tr. 337.

³ *Ib.*; *Parsons v. Lanoe*, 1 Ves. Sen. 190; s. c., *Ambl.* 557.

⁴ *Cawthron, Goods of*, 3 Sw. & Tr. 417. On the other hand, the due execution of a new and inconsistent will would supersede any such contingent will. See *Ward's Goods*, 4 Hagg. 179.

⁵ *Thorne, Goods of*, 4 S. & T. 36.

testator directed that his will was to take effect only in the event of his son dying under twenty-one years of age, and his daughter dying under that age and unmarried; and then went on to leave various legacies and appointed an executor.¹ Or where a will began: "In case of any fatal accident happening to me, being about to travel by railway, I hereby leave," etc.²

¹ Cooper, Goods of, Dea. & Sw. 9. If the event is still in suspense (as seems to have been the case here, though the report is not clear), the will should be admitted to probate. 1 Jarm. Wills, 17.

² Dobson, Goods of, L. R. 1 P. & D. 88. Here the operation of the will is not expressly limited to a certain time.

Even the latest English cases run very close in point of construction, as may be seen by comparing Porter, Goods of, L. R. 2 P. & D. 22, with the cases cited therein. Here a paper made use of this language: "Being obliged to leave England to join my regiment in China, I leave this paper containing my wishes. Should anything unfortunately happen to me whilst abroad, I wish everything that I may be in possession of at that time, or anything appertaining to me hereafter, to be divided," etc. The testator returned from China, and afterwards died. Said Lord Penzance: "The court is bound to hold that this will is conditional. Looking at the cases already decided, and the principles therein laid down as to contingent wills; I find a distinction drawn. It is the common feature of wills in respect of which this sort of question arises, that the testator therein refers to a possible impending calamity in connection with his will; and the question arises, whether he intends to limit the operation of the will to the time during which such calamity is imminent. If the language used by him can by any reasonable interpretation be construed to mean that he refers to the calamity and the period of time during which it may happen, as the reason for making a will, then the will is not con-

ditional; but if he refers to the calamity or the possible occurrence of some event as a reason for a certain disposition of his property, and mixes up the disposition of the property with the event so that one is dependent on the other, then the court must hold the will to be conditional." The former English cases are here reviewed and distinguished. And see Robinson, Goods of, L. R. 2 P. & D. 171; Martin, Goods of, L. R. 1 P. & D. 380.

Nevertheless, to take such wills as expressed on their face, the distinction appears wire-drawn. For in a still later decision the will was decided not to be contingent upon death, though expressed as follows: "On leaving this station for T. and M., in case of my death on the way, know all men this is a memorandum of my last will and testament." Mayd, Goods of, 6 P. D. 17. Says Sir James Hannen: "The meaning of general phrases of this kind is, 'knowing the uncertainty of human life, and being about to enter on something particularly dangerous, I make this my will'; and the court ought not to scrutinize such expressions with too great nicety." *Ib.*

It is generally found that wills of this character employ language careless and inartificial, and that they are not prepared under competent professional guidance. All the more, then, should courts incline against giving to the expressed peril the full force of a condition, in case of legal doubt. By discouraging contingent wills in construction, they are most likely to disappear; and if so, all the better for our jurisprudence.

§ 288. **The Same Subject: American Cases.**—In this country, it is generally conceded that a statute, execution by means of signature and attestation leaves the validity of the instrument to be so tested by proof of due execution and its contents, that parol evidence of subsequent adherence to the will cannot aid it against a clearly expressed contingency upon which its effect is declared dependent. At the same time, where the words do not clearly express that the entire instrument shall fail or take effect upon a particular event, a probate is favored, either upon the theory that there was no such fundamental contingency, or so as to leave a court of construction to determine how far the provisions of the will, the devises and bequests, were affected by it.¹ Where a will is so expressed as to depend upon a contingency which does not happen, a later re-execution or republication is needful, as under the policy of English legislation, in order to give the will new validity.²

There are several American cases in which these principles have been liberally applied, so as to admit to probate wills which, if rigidly interpreted, might be thought conditional. Thus, in Massachusetts, where a testator commenced his will as follows: "I, A. B., being about to go to Cuba, and knowing the danger of voyages, do make this as my last will and testament, in manner and form following: First, if by casualty or otherwise I should lose my life during this voyage, I

¹ French *v.* French, 14 W.Va. 458, and cases cited; Damon *v.* Damon, 8 Allen, 192; Lindsay, *Ex parte*, 2 Bradf. Sur. 204. This exclusion of parol evidence of subsequent recognition or disaffirmance may sometimes be favorable to the will.

In Lindsay, *Ex parte*, *supra*, the court observes as follows: "If the will be admitted to probate, it will still remain a matter of construction whether the bequests are made dependent upon a condition or contingency. If it be denied probate, that question cannot be brought before a court of construction. If, therefore, in a case of this kind

there be room for reasonable doubt as to the contingent character of the instrument, if there are not clear and unquestionable terms of contingency, the probate judge is justified in a sentence of probate on the formal proof, so as to leave the determination of its conditional nature for subsequent construction and interpretation." This is a very just and sensible view to take of the subject.

² See Dougherty *v.* Dougherty, 4 Met. (Ky.) 25, where this principle is more doubtfully expressed than it need have been; also Part IV. c. 3.

give and bequeath to my wife," etc.¹ Again, in New York, where the will began: "According to my present intention, should anything happen to me before I reach my friends in St. Louis, I wish to make a correct disposal of the three hundred dollars now in the hands of H.," etc.² And once more by a very free interpretation, in a late West Virginia case, the following instrument: "Let all men know hereby, if I get drowned this morning, March 7, 1872, that I bequeath all my property, personal and real, to my beloved wife F."³

§ 289. **The Same Subject.**—On the other hand, several American cases have treated a will of dubious phrase as contingent. Thus, in Kentucky, where a will devised real estate after this form: "As I intend starting in a few days to the State of Missouri, and should anything happen that I should not return alive, my wish is," etc.⁴ And in Missouri, where, very curiously, a will couched in nearly the same language, began: "I start this day for Kentucky," etc.⁵ In each instance, the testator was fortunate enough to go to and fro between these two States alive, and his will failed in consequence. More recently, in Pennsylvania, a testamentary paper, badly worded and spelled, and awkwardly expressed, was refused probate, where the direction was, "If I should not get back, do as I say," and the testator, as the brief showed, became ill on his journey, was brought back, in fact, and died at home several days after.⁶

¹ *Damon v. Damon*, 8 Allen, 192. This same will gave other independent bequests, and spoke of the instrument as the testator's last will and testament. The effect of the contingent expression, in this carelessly drawn will, upon the first clause as contrasted with the later ones, the court did not consider; that being a matter of later construction not interfering with a probate.

² *Lindsay, Ex parte*, 2 Bradf. Sur. 204.

³ *French v. French*, 14 W. Va. 458; Green, Pres., dissenting. In the opinions here pronounced, the later precedents, English and American, are quite exhaustively cited and compared. See

also *Kelleher v. Kernan*, 60 Md. 440; *Barton's Estate*, 52 Cal. 538.

Such will being absolute and not contingent, and the law having made a change in heirship between the date of the will and that of the testator's death, no presumption against the will arises in consequence. *French v. French*, 14 W. Va. 458.

⁴ *Dougherty v. Dougherty*, 4 Met. (Ky.) 25. See also *Todd's Will*, 2 W. & S. 145; *Broadus v. Rosson*, 3 Leigh, 12; *Wagner v. M'Donald*, 2 Har. & J. 346; *French v. French*, 14 W. Va. 458, and cases cited; *Myrick*, 157.

⁵ *Robnett v. Ashlock*, 49 Mo. 171.

⁶ *Morrow's Appeal*, 116 Penn. St. 440.

§ 290. **The Same Subject: Bearing of Extrinsic Evidence in Such Cases.**—This doctrine of conditional or contingent wills is, on the whole, so rarely invoked, that the bearing of extrinsic evidence in such cases has not been fully unfolded in the decisions. Where a statute mode of execution or re-execution is strictly prescribed, the intention of the testator to make and finally leave at his death a conditional will, must appear very clearly on the face of the will. Careless and in-artificial expressions, however, are to be treated with ample allowance, technical informalities disregarded, traces of the testator's intention sought out in every part of the instrument, and the whole carefully weighed together.

But as to evidence outside the instrument, and particularly mere declarations and other oral proof, while, doubtless such testimony is inadmissible to control the construction of the will, or contradict its clear expression of intent, it may still be asked whether the court is not at liberty to go outside in case of inevitable doubt, to help resolve an ambiguity. Authority is not explicit on this point; nor perhaps can so extreme a case be found in our modern practice; but certainly such oral proof is not favored, and the court prefers to put its own construction upon the language contained in the will. Yet it is held, and with good reason, that the surrounding circumstances of the execution may be shown to aid in ascertaining the true interpretation of the will. Such proof may aid in determining, for instance, whether the testator merely had a particular peril or exposure in view as inducing him to make his will, or, what is more improbable, meant that its effect should depend wholly upon death from that peril or exposure.¹ And even conceding, as we must, that our Wills

¹ *French v. French*, 14 W. Va. 460. This subject of admitting extrinsic evidence to aid in resolving the doubtful expressions of a will is here discussed at much length. From the dissenting opinion one would infer that considerable parol evidence, not legally admissible, was introduced. But the rest of the court, while sustaining the will, contend that no testimony inadmissible or

loosely admitted affected their conclusion; and the report of the case confirms, on the whole, this impression. And see *Kelleher v. Kernan*, 60 Md. 440, where parol proof of the testator's intention to provide for his daughter in anticipation of the journey was held admissible as showing his condition of mind when the will was made.

Acts exclude all parol evidence of recognition, adherence to the will, or ratification after the peril was past (since a republication is required), we see no reason why the very circumstance that the will in question has never been cancelled, but is produced from proper custody on the testator's death and presented for probate, may not be adduced in favor of its intended validity; just as that circumstance carries weight, where insanity with lucid intervals of coercion is set up against a will. For, after all, conditional wills are of so peculiar a description, and operate usually so disastrously, not to say senselessly, that any doubt should be resolved in favor of absolute character and a probate.

§ 291. **Wills may take Effect in the Alternative.** — Wills may be expressed so as to take effect in the alternative with reference to a stated contingency. As if a testator should execute one will, and afterwards a second will; and then by a third will or codicil declare that the first will shall be his last will if he dies before a given date, otherwise the second will shall be his last will.¹

§ 292. **Contingency or Condition not to be supplied by Parol Proof.** — The contingent or conditional wills we have described involve the construction of an instrument whose conditional import appears upon its face. A will duly executed *animo testandi* and in form absolute is not to be shown contingent or conditional and inoperative by extrinsic proof.²

§ 293. **Operation of Will left to the Discretion of Another.** — A singular kind of testamentary condition has been sustained in a late English case. A testator wrote a codicil to his will, which concluded as follows: "I give my wife the option of adding this codicil to my will or not, as she may think proper

¹ Hamilton's Estate, 74 Penn. St. 69. The point of contingency should be definitely stated in such a case, and the alternate instruments well identified.

² Sewell v. Slingluff, 57 Md. 537. In this novel case a will was contested on the ground that the testatrix had in-

tended it to be used and probated as her will only in the event of her dying without issue. The will expressed no qualification of the kind; and it was properly held that parol evidence was inadmissible to show such an intent.

or necessary." The court decided that a condition or option like this was not illegal nor invalid; at the same time conceding that one can neither confide to another the right to make a will for him, nor authorize any person to revoke his will after his death.¹ And in the present instance, the validity of the codicil being treated as conditional on the assent of the wife, and the wife dissenting, its probate was refused.²

§ 294. Papers which cannot be probated as Wills; Wills merely appointing a Guardian; appointing to a Situation; excluding from Inheritance, etc.—There are documents designed for posthumous effect, which cannot be probated as wills for want of the character essential to such dispositions in order to give the court jurisdiction. Thus a paper executed as a last will, which does no more than name a guardian for one's children, and neither disposes of property nor nominates an executor, is excluded from probate.³ But in various American States, where legislation confers upon the probate court original jurisdiction in the appointment of guardians as well as executors, and makes special mention of testamentary guardians, besides, a different rule may prevail.⁴

Nor is the mere written appointment to a situation after one's death a testamentary paper, though duly executed and witnessed.⁵

¹ That a testator cannot delegate to another the power to revoke his will after death, see *Revocation*, *post*; 1 Robert. 661; North *Re*, 6 Jur. 564.

² Smith, Goods of, L. R. 1 P. & D. 717. What would have been the effect of such a codicil had the wife died before her husband, or too soon to declare her option at all, the court did not consider. But the learned judge took the ground that there is nothing in the law or common sense to prevent a testator from saying that the question whether his will shall fundamentally operate, that is, become a will at all or not, shall depend upon something to happen after his death. Such a proposition, we submit, is open to grave dispute; and if titles by succession

may legally be hung up thus at the caprice of a person who chooses to leave it for years or forever uncertain whether he dies testate or intestate, it is time for legislation to prevent intolerable mischief, and at all events protect creditors of the estate. The least a court can do in such a case is to promptly decree probate of the will after the testator's death, without waiting for any later contingency to be determined.

³ Morton, Goods of, 3 Sw. & Tr. 422.

⁴ Concerning testamentary guardianship, etc., see Schoul. Dom. Rel. 3d Ed. §§ 287, 290.

⁵ *Thorncroft v. Lashmar*, 2 Sw. & Tr. 479.

In short, a will to operate as such must make or attempt a total or partial disposition of property, to take effect at the testator's death, or at least, must name an executor ; and it is not enough that the instrument purports to be a will and is executed with all the testamentary formalities, when it accomplishes nothing of a testamentary character.¹

§ 295. **The Same Subject: Wills which merely dispose of Real Estate.**—The old English rule founded ecclesiastical jurisdiction essentially upon such testamentary acts as affected personal property. Hence it has been ruled in England in times past that a will which disposes of real estate alone cannot upon any pretext be admitted to probate.² But the later tendency of legislation in that country is to a more uniform system of probate, whether the disposition affects lands or any other species of property ; while in the United States, the policy is to require a probate of all wills, whether relating to realty or personalty, or both together.³

§ 296. **The Same Subject: Writings which merely revoke.**—So, too, English courts have hesitated as to admitting papers to probate as testamentary which do no more than manifest the intention of revoking a regular will or codicil. Lord Penzance in two recent cases owned the delicacy of a distinction ; but concluded, that while one duly signed and attested memorandum which did something more than revoke a will might be deemed a will or codicil, another, similarly prepared, and executed, which, at the foot of a will, said, "This will was

¹ Cf. §§ 297, 298. In a curious Virginian case a man made a will, so called, which purported simply to exclude a certain son, for reasons stated, from participating in his estate at his death, and yet made no disposition of property. It was held that this was no will ; that the deceased died intestate, and that consequently this son was entitled to share in the distribution. *Coffman v. Coffman*, 85 Va. 459.

² *Drummond's Goods*, 2 Sw. & Tr. 11 ; *Barden's Goods*, L. R. 1 P. & D. 325. Even though the instrument

should give directions for a sale of part of the estate and the payment of legacies out of the proceeds, probate must be refused. *Bootle, Goods of*, L. R. 3 P. & D. 177. It cannot be denied that a will which disposes of land alone is testamentary, whether one court or another takes jurisdiction of it.

³ *Schoul. Exrs. & Admsrs.* § 59 ; 1 Wms. Exrs. 341, 388 ; Act. 20 and 21 Vict. c. 77, § 64 ; *Shumway v. Holbrook*, 1 Pick. 114 ; Mass. Pub. Stats. c. 127, § 7 ; *Wilkinson v. Leland*, 2 Pet. 655.

cancelled this day," could not be admitted to probate.¹ Yet a separate instrument, duly signed and attested, which declares one's intent of revoking a former will, or all former ones, and that his estate shall be settled according to law, is undoubtedly a will and should be admitted to probate as such.²

§ 297. **Wills Good which simply nominate an Executor; Wills without an Executor.** — But a will which simply nominates an executor, without giving him a legacy or making any direct disposition of the property is a good one, and entitled as such to probate.³ And if the nomination constitutes it a will, the fact that such executor afterwards renounces the appointment cannot change the character of the instrument nor deprive it of probate.⁴ One who is simply made an executor is clothed by implication with the usual functions pertaining to the office; and as for the property, silence imports a descent and distribution such as the statute prescribes for intestate estates; though, doubtless, it is expedient that wills of this sort should expressly direct a final settlement after that course.

Wills, on the other hand, are pronounced good in modern practice, which make provision for settling the estate but name no executor at all.⁵

¹ Fraser, Goods of, L. R. 2 P. & D. 40. Cf. Hicks, Goods of, L. R. 1 P. & D. 683, where the memorandum which satisfied said further "and as yet I have made no other [will]." These cases construe the 20th section of the Wills Act. See *post* as to Revocation of Wills.

² Bayley v. Bailey, 5 Cush. 245; Hicks, Goods of, *supra*.

³ Godolph. pt. 2, c. 5, § 1; 1 Wms. Exrs. 227; Lancaster, Goods of, 1 Sw. & Tr. 464; Miskelly *Re*, 4 Ir. Eq. 12; Schoul. Exrs. & Admsrs. § 31; Miller v. Miller, 32 La. An. 437; Barber v. Barber, 17 Hun. 72.

⁴ Jordan, Goods of, L. R. 1 P. & D. 555.

Where a will, executed in due form,

is followed by a clause, appointing an executor, which is not signed or witnessed in compliance with the statute; the will is valid, except for the appointing clause. Myrick Prob. (Cal.) 76.

⁵ Wms. Exrs. 7; Schoul. Exrs. & Admsrs. § 3. And see Brady v. McCrosson, 5 Redf. 431, where the rule takes effect, when the appointment of the executor was in an appended clause to the will, which the testator signed, but not the witnesses. Myrick Prob. 76.

The effect of naming no executor, or of renunciation by the executor named, is to admit the will to probate; the court constituting an administrator with the will annexed of the emergency. Schoul. Exrs. & Admsrs. § 122.

§ 298. **Wills Good which make only a Partial Disposition, or distribute as in Case of Intestacy.** — Wills, furthermore, are good which make only a partial disposition of one's property; for, whether it be through legal operation of the will or because the testator so intended, one may die testate as to a portion of his estate and intestate as to the residue.¹ And one may by his will expressly provide either that the whole or some specific portion of his property shall descend and be distributed according to the local statute, as though he died intestate.²

§ 299. **Wills executed under a Power.** — Attention was formerly bestowed in England upon wills executed under a power of appointment; the general rule being, that the instrument creating the power ought to be followed as to the mode of exercising it.³ But the erroneous exercise of a power is held to operate as a will if the person had a right to dispose of the fund.⁴ Such questions seldom occur in American practice;⁵ and English legislation now sanctions the broad principle favored by our policy, that appointments by will in exercise of any power, require for their validity the same formalities of execution and attestation as other wills, and nothing beyond, notwithstanding any terms which may have been employed in creating the power.⁶

¹ Schoul. Exrs. & Adms. § 250.

² Lucas v. Parsons, 24 Ga. 640.

³ Temple v. Walker, 3 Phillim. 394.

A wife might by virtue of a power execute a will without her husband's consent by way of exception to the rule. See *supra*, § 64; 1 Wms. Exrs. 384.

⁴ Southall v. Jones, 1 Sw. & Tr. 298.

⁵ See Porter v. Turner, 3 S. & R. 108.

⁶ Stat. 1 Vict. c. 26, § 10; Crooken-den v. Fuller, 1 Sw. & Tr. 70; Hubbard v. Lee, L. R. 1 Ex. 255; 13 W. R. 394; Blackburn R_e, 43 Ch. D. 75.

CHAPTER II.

SIGNATURE BY THE TESTATOR.

§ 300. **Statute Requirements as to Signing; English Rule.** — In England a will of personal property was valid without any signature by the testator, until the statute of 1 Vict. c. 26 came into operation; that is to say, if made before Jan. 1, 1838; and whether the will was in the handwriting of the testator or of some other person duly authorized by him under such circumstances, the rule was the same.¹ But under this later statute the prescribed formalities apply equally to wills of real and personal property.²

On the other hand, the Statute of Frauds³ had for more than a century and a half required that all devises and bequests of lands or tenements should be in writing, signed by the testator, or by some other person in his presence, and by his express direction, and should be attested or subscribed in his presence by three or four credible witnesses.⁴ The modern statute, 1 Vict. c. 26, making the word "will" comprehend all testamentary dispositions, and using the convenient terms "personal estate" and "real estate," to denote the two grand divisions of property, declares that no will shall be valid unless in writing, and signed at the foot or end thereof by the testator, or by some other person in his presence, and by his direction; and such signature shall be made or acknowledged by the testator in the presence of two or more witnesses present at the same time, and such witnesses shall attest and shall subscribe the will in the presence of the testator, but no form of attestation

¹ Salmon *v.* Hays, 4 Hagg. 382; 1 Wms. Exrs. 68.

² *Supra*, § 253.

³ 29 Car. II. c. 3, § 19.

⁴ The word "hereditaments" is omitted from this clause of the famous statute, but found in other parts of it. See Lord Alvanley, in 2 Ves. jr. 661.

shall be necessary.¹ It is under this latter statute that the modern English cases which deserve our chief study are ranged.

§ 301. **Statute Requirements as to Signing: American Rule** — The policy of the older Statute of Frauds in this respect has strongly impressed the testamentary jurisprudence of our several States. But, admitting local variations as to the number of attesting witnesses required, and, of course, local exceptions of principle, our American legislatures insist, at this day, upon a formal signature and attestation to each will, codicil, or testament,² regardless of the character of the property embraced under the disposition, and to much the same effect as the English Statute of 1837, but, on the whole, with less nicety of expression. The Massachusetts code, for instance, prescribes for each testator a will in writing, "signed by him or by some person in his presence and by his express direction, and attested and subscribed in his presence by three or more competent witnesses."³ The New York statute pronounces more explicitly for subscription by the testator "at the end of the will"; adding further provisions for making or acknowledging the signature in presence of the witnesses.⁴ Other States employ still different language in their respective codes. Of the peculiar virtue ascribed to the holograph wills,⁵ even to this day, in various States, some of whose legislatures insist, nevertheless, that the writing shall be signed by the testator himself, we have already spoken.⁶ In short, as local codes differ, our present investigation must be held strictly subject to local variations of statute requirement, wherever the essential formalities of execution come up for discussion.

§ 302. **Whether Execution signifies more than Signing, or includes Attestation.** — In general phrase one may speak of the proper execution of a will as involving the full legal

¹ Stat. 1 Vict. c. 26 (1837).

² The few instances where nuncupative wills are still permitted follow a different rule.

³ Mass. Pub. Stats. (1882) c. 127, § 1.

⁴ N. Y. Rev. Stats. 1875, Vol. 3, c. 6, p. 63.

⁵ Or those in a testator's own handwriting.

⁶ *Supra*, § 255; 43 La. Ann. 310.

formalities of a signature and attestation; and for convenience we have usually so employed that word in these pages.¹ But some authorities appear to apply the words "execution" and "attestation" separately, as though the former term related only to the testator's own act; and use "execution and attestation" to denote the whole formality.²

§ 303. **Will may be signed by the Testator, or his Mark made, etc.**—What, we now inquire, amounts to a "signing" by the testator so as to satisfy the statute requirement on the subject of wills? To write out one's own name in full is doubtless the safest course, as well as the most natural; for such compliance best indicates a rational mind, free will, and physical power, at the date of execution. But, undoubtedly, the making of his mark by the testator will satisfy the statute; and that, too, as various cases rule, notwithstanding he was able to write at the time.³ Thus has it been held in cases arising under the Statute of Frauds;⁴ and those decisions apply equally to the Statute of Victoria, which is expressed in language almost identical; as also to most American codes. Other modes of signature are permitted besides. Accordingly, the will has been upheld where the testator made a mark, with his hand guided or not guided by another;⁵ or where the testator wrote only his initials;⁶ or where his full signature was effected by the aid of another person who guided his hand;⁷ or where he stamped

¹ Statute 1 Vict. c. 26, § 9, sanctions this use of the word. It declares that no will shall be valid unless in writing "and executed in manner hereinafter mentioned"; and then proceeds to describe the details of signing, acknowledging, and attesting the will.

² See 1 Jarm. Wills, title to c. 6, etc. This narrower sense of the word "execution" is not to be commended for modern practice.

³ *Baker v. Dening*, 8 Ad. & El. 94; *Sprague v. Luther*, 8 R. I. 252; *Chase v. Kittredge*, 11 Allen, 49; *Higgins v. Carlton*, 28 Md. 115; *Cozzen's Will*, 61 Penn. St. 196.

⁴ See 1 Wms. Exrs. 76; *Baker v. Dening*, 8 Ad. & El. 94.

⁵ *Wilson v. Beddard*, 12 Sim. 28; *Baker v. Dening*, *supra*; *Jackson v. Van Dusen*, 5 John. 144; *Nickerson v. Buck*, 12 Cush. 332; *Upchurch v. Upchurch*, 16 B. Mon. 102.

⁶ *Savory Re*, 15 Jur. 1042. Or where he affixed a seal stamped with his initials, and pronounced it his "hand and seal." *Emerson, Goods of*, L. R. 9 Ir. 443.

⁷ *Vandruft v. Rinehart*, 29 Penn. St. 232; *Stevens v. Van Cleve*, 4 Wash. (U. S. Cir.) 262. In *Wilson v. Beddard*, 12 Sim. 28, some stress was laid

his name;¹ or where only the Christian name was signed;² provided that in all such cases the testator's knowledge and free consent and completed testamentary purpose accompany the act, which here is an act of signature by himself.

The statute is satisfied, moreover, where the testator having requested another to sign the paper as his will for him, the latter complies under the strict precautions of the code.³ Or where, in the testator's presence and by his direction, another person under the same precautions stamps the will by way of signature with an instrument on which the testator has had his usual signature engraved for convenience in stamping letters or other documents requiring his signature.⁴ For under the Statute of Frauds, as well as the Wills Act of Victoria, and various codes in the United States, provision is made for the signing of the will, not only by the testator himself, but also by some other person in his presence and by his express direction.⁵ There are States, however, where this signing by another is placed by legislation under much narrower restraints.⁶

§ 304. **The Same Subject.**—It has been held in some instances that where the testator signs under an assumed name, such a signature may satisfy the statute by passing as the testator's mark.⁷ However this may be, an imperfect or indistinct subscription of the testator's name to the will may be regarded as his mark.⁸ There are American statutes,

upon the circumstance that the testator, before having his hand guided to execute the paper, made some faint strokes upon each of the sheets.

¹ See *Jenkins v. Gaisford*, 3 Sw. & Tr. 93.

² *Knox's Estate*, 131 Penn. St. 220. "Custom controls the rule of names, and so it does the rule of signatures." *Ib.* 231.

³ *Vernon v. Kirk*, 30 Penn. St. 218; *Abraham v. Wilkins*, 17 Ark. 292.

⁴ *Jenkins v. Gaisford*, 3 Sw. & Tr. 93. *Ergo*, such a stamp the testator may use to make his own signature, instead of

signing with the ordinary writing materials; the essential question being whether such an instrument was used *animo testandi*. In the present case the testator was paralyzed, and the stamp made for him on that account.

⁵ *Supra*, §§ 300, 301; *Riley v. Riley*, 36 Ala. 496.

⁶ *McElwaine Re*, 3 C. E. Green, 499; *Vines v. Clingfost*, 21 Ark. 309.

⁷ *Redding, Goods of*, 2 Robert. 339; 1 Wms. Exrs. 76.

⁸ *Hartwell v. McMaster*, 1 Redf. 389.

furthermore, which expressly authorize the signature by mark.¹ But it should still be observed that the mark or indistinct subscription by the testator should have been intended by him as his signature.²

§ 305. **A Prudent Testator will write out his own Signature if he can.** — But while the signature by mark, by a stamping device, or by the hand of some other person in the testator's presence, by his express direction, may satisfy the letter of legal requirement, no one who is competent to write out his own signature executes his will wisely, unless he either signs thus or shows some good reason to the contrary, which can be explained at the probate. For the burden of establishing the instrument he leaves behind is sufficiently great, even though he should cast no needless discredit upon it. The uncommon modes of signing naturally import illiteracy, feebleness, or dependence upon others, and easily encourage the imputation of fraud, imposition, or error in the transaction, unless very cautiously pursued.³ In Pennsylvania, and some other States, the testator must sign by his own proper signa-

¹ *Smith v. Dolby*, 4 Harring. 350; *Burford v. Burford*, 29 Penn. St. 221.

The Pennsylvania act referred to in *Burford v. Burford*, *supra*, was passed in 1848 under singular circumstances. Contrary to the current of English and American authority, the Pennsylvania courts took early ground that signing by mark or cross would not give the will validity. *Cavett's Appeal*, 8 W. & S. 21; 5 Penn. St. 21, 441; *Greenough v. Greenough*, 11 Penn. St. 489. The statute thus strictly construed was the act of 1833, taken from 29 Car. II. § 2, under which it had been repeatedly decided that a signature by mark was sufficient. The above cases were justly criticised in *Vernon v. Kirk*, 30 Penn. St. 218, where it was said: "If a mark was not a signature within the meaning of the statute, then those unable to write could not sign, and signing by another was permitted only when in-

ability to sign was caused by the extremity of the last illness."

² On the supposition that a faint mark or marks on the writing set up as a will did not appear to have been placed there with the intent of signing, a will was pronounced invalid in *Everhart v. Everhart*, 34 Fed. R. 82. Where a testator, who, in his ordinary condition, can write his name, makes such a mark in an unusual place, there is all the more ground for doubting that he fully intended a signature. *Ib.* § 313.

³ Mr. Jarman, writing for English readers, considers it inadvisable for a testator in these days to sign by another, unless physically very weak, so that he cannot even make his mark. Even illiterate persons and paralytics had better sign by mark than sign by another. (See 3 Curt. 752.) In short, as he observes, the testator should conform as nearly as possible to his usual mode. 1 *Jarm. Wills*, 110.

ture, if he is able to do so;¹ and though most authorities have ruled less positively on the subject, it seems always proper, where a testator habitually wrote his own name and did not in this instance, for the court, in case of a contest, to try and elicit some explanation, and, if none satisfactory be given, to take the circumstance into account adversely, where other suspicious circumstances of more positive bearing are shown besides. Signing by another is especially liable to doubt and suspicion.

Nevertheless, the general rule in the American States is said to be, that the testator may sign by his mark, and that where he does so, it will be presumed that he does it from necessity, either temporary or permanent.²

§ 306. **Local Variations of Rule; Signature by Testator himself and by another distinguished.**—If the rule on this subject appears rather uncertain, we must first allow for local variations in statute and each legislative policy. Next, we should bear in mind, that signature by the testator himself and signature by another are distinguished in all these codes.

There is by no means the same facility accorded for signature by attorney where a will is to be executed as in the ordinary transactions of life. If an illiterate but intelligent testator makes cross-strokes with his pen upon the paper, the act of signature is his own; and so, too, where the hand of a testator, who is physically unable to subscribe without assistance, is guided by another. Wherever, in truth, the act is the testator's own act, *animo testandi*, though with the assistance of another, it is not necessary to prove any express request for assistance on his part.³ And under any

¹ 5 Penn. St. 21, 441. Cf. Cozzen's Will, 61 Penn. St. 196. And see Butler v. Benson, 1 Barb. 526; Fritz v. Turner, 46 N. J. Eq. 515.

² 1 Redf. Wills, 205, note, citing Upchurch v. Upchurch, 16 B. Mon. 102; and Ray v. Hill, 3 Strobb. 297.

The Pennsylvania statute requires the testator to sign, or direct another to sign for him, unless prevented by the extremity of his last illness; and to

bring the will within the exception, there must be two witnesses to show, (1) the inability of the testator to sign, (2) his inability to direct another to sign. Rudff's Appeal, 26 Penn. St. 219. And see 9 Penn. St. 54.

³ Van Hanswick v. Wiese, 44 Barb. 494; Vandruff v. Rinehart, 29 Penn. St. 232.

Where a testator subscribes by mark, it is the mark, and not the name written

circumstances, a testator signs his will, where he makes the physical effort, and performs the act, even though his hand be steadied or guided by another, if something is produced upon the paper, sufficient to identify his signature, and his own purpose to sign accompanied the action, while he was assisted and not controlled.¹

But the mere fact that the testator's name is written, or his mark made by another person, affords no presumptive evidence that it was done at his request and in his presence.² As to this act of another under authority from the testator, the statute direction, usually imperative and strict, must be carefully observed; for wherever the "signing" is, so to speak, not the testator's own, but something which he is to adopt, great hazard is incurred.³ A subscription, "A. B. for C. D., at his request," is held a sufficient form to be followed;⁴ and under many State codes this form would doubtless be dispensed with, upon due proof of the surrounding circumstances, showing that all was rightly and properly done. But there are American codes which insist upon more than this; that of New Jersey, for instance, whose policy guards with great jealousy the making of a will without the testator's own signature. In this State, the statute providing that "the signature shall be made by the testator, or the making thereof acknowledged by him in the presence of two witnesses," it is held insufficient that another should write the name at the request of the testator.⁵ And generally

round it by another, which constitutes the subscription; and hence it is immaterial whether such name is written before or after the mark is made. *Jackson v. Jackson*, 39 N. Y. 153. The writing of the testator's name with the words "his mark" to identify a subscription by mark, is not the "signing of his name by his direction," etc., under the statute. *Ib.*

¹ See *Fritz v. Turner*, 46 N. J. Eq. 515.

² *Greenough v. Greenough*, 11 Penn. St. 489.

³ If a testator makes his own mark,

he signs; and the addition of the words "his mark" by a stranger does not impair the validity of his signature. *Grubbs v. McDonald*, 91 Penn. St. 236. And see *Jackson v. Jackson*, 39 N. Y. 153.

⁴ *Vernon v. Kirk*, 30 Penn. St. 218; *Abraham v. Wilkins*, 17 Ark. 292.

⁵ *McElwaine Re*, 3 C. E. Green, 499. In this case the testator adopted the signature as his before two witnesses, but did not "acknowledge the making thereof." This decision was a harsh one, and, as the court admitted, set aside, in fact, what the deceased doubtless had intended as his will; it

speaking, there must be no ambiguous proof of authority to sign on the testator's behalf; for "express direction," and not indirect permission, is the usual intendment of our codes.¹

§ 307. **The Same Subject: English Rule.**—Under the Statute of Victoria it has been held that where the testator duly acknowledged his signature to the attesting witnesses, this is *prima facie* sufficient, without proving that the signature is in his handwriting or that it was made by some other person in his presence and by his direction.² And the person who signs for the testator, at the latter's express request, may sign the will for him, not in the testator's name, but using his own name.³ But this signature in one's presence by a third party must, in general, be accompanied by some act or word on the part of the testator, to show that it was made at his request.⁴

§ 308. **Testator's Name may be affixed by a Subscribing Witness.**—A testator's name may, at his request and in his presence, be affixed to his will by a competent subscribing witness, as well as by any third party; and the effect of this is the same as though the name were written by the testator himself.⁵ Some codes make it imperative that any one who shall

proceeded upon a close interpretation of a strict statute. *Cf.* *Smith v. Harris*, 1 Robert. 262, which tends to the contrary view.

And see *Vines v. Clingfost*, 21 Ark. 309, cited *post*, § 308. Under the Missouri code strict formalities are prescribed where one signs the testator's name at his alleged request. *McGee v. Porter*, 14 Mo. 611; 19 Mo. 609; 21 Mo. 17. But in Ohio proof that one signed in the testator's presence and by his express direction, is quite liberally treated. *Haynes v. Haynes*, 33 Ohio St. 598. See also *Peake v. Jenkins*, 80 Va. 293.

¹ *Waite v. Frisbie*, 45 Minn. 361.

² *Gaze v. Gaze*, 3 Curt. 456.

³ *Clark, Goods of*, 2 Curt. 329. Here

the will ran, "Signed on behalf of the testator, by me, A. B.," etc. And see 6 notes Cas. 528, cited in 1 Jarm. Wills, 79, where the person who signed for the testator did so by writing at the foot, "This will was read and approved by C. F. B., by C. C., in the presence of," etc., and then followed the signatures of the witnesses. These wills were held good.

⁴ *Cf.* 13 Law Times, 643, and 20 Law Times, 757. According to Mr. Jarman, it is well where a third person signs for the testator, to have it in the name of the testator rather than of the amanuensis, who should be thus designated in the attestation clause. 1 Jarm. 110.

⁵ *Herbert v. Berrier*, 81 Ind. 1; *Rob-*

sign the testator's name by his direction, shall write his own name as a witness and state that he signed at request; though where the testator holds the pen and another person guides it, the act, as we have seen, is the testator's own, and such writing and statement by the witness is not necessary.¹

The English rule also permits the signature for the testator in his presence and by his express direction to be made by one of the attesting witnesses.²

§ 309. **Seals are dispensed with; Sealing is not "Signing."** — A seal is not indispensable to a will in modern times, unless, as rarely happens, the local statute insists upon it.³ Nor is a will rendered invalid for want of a seal, even though the attestation clause should speak of its being "signed and sealed."⁴ In various American States, indeed, the use of a seal has lost most of the efficacy our common law once bestowed upon it. But testaments are still signed and sealed in very many instances; and this solemn but simple precaution may often prove a sensible one for allaying doubt, where powers touching real estate are expressly given.⁵ At the same time, the unnecessary addition of a seal does not change a will into a deed, nor justify treating the instrument as partly a will and partly a deed when it was obviously meant as a will alone.⁶

Sealing was once thought a sufficient substitute for signing where wills were to be executed; but that doctrine is no

ins v. Coryell, 27 Barb. 556; 6 Dem. 262; Riley v. Riley, 36 Ala. 496. But see McElwaine *Re*, 3 C. E. Green, 499, under the peculiar statute of New Jersey.

¹ Vines v. Clingfost, 21 Ark. 309; McGee v. Porter, 14 Mo. 611.

² Bailey, Goods of, 1 Curt. 914; Smith v. Harris, 1 Robert 262.

³ Avery v. Pixley, 4 Mass. 460; Piatt v. McCullough, 1 McLean, 69; Williams v. Burnett, Wright, 53; Arndt v. Arndt, 1 S. & R. 256; Doe v. Pattison,

2 Blackf. 355; Grubbs v. McDonald, 91 Penn. St. 236.

⁴ 8 Mo. App. 66.

⁵ The *lex loci* as to the method of conveying land should not be unheeded. In New Hampshire sealing is required to a will of real estate, according to Rev. Stats. 1842, c. 156, § 6. So is it with one or two other States. 1 Jarm. Wills, 105, Bigelow's note.

⁶ Wuesthoff v. Germania Life Ins. Co., 107 N. Y. 580. Here the appointment of a guardian was the matter in controversy.

longer tenable;¹ for it is clear that signing and sealing are different acts, though capable of being united.²

§ 310. **Misnomer or Discrepancy in the Signature, etc.** — A document signed as one's will through some palpable error or fraud, when it was in reality another's will or no will at all, cannot of course stand.³ But if the right instrument is intentionally signed as one's own will, a mere misnomer or discrepancy of signature does not vitiate the paper, provided its genuineness be duly established. As where the will of T. D. describes the testator throughout by a wrong name, such as C. D. and he signs it by his right one.⁴ Or where against the testator's mark a wrong name is written, the will describing him by the right one.⁵ Or where the maiden name of a testatrix is interchanged with her married one under like circumstances.⁶ And generally, where one signs *animo testandi*, though by a wrong or assumed name.⁷

A signature, whether by name or mark, satisfies the statute, notwithstanding the testator's name does not appear at all in the body of the instrument.⁸

§ 311. **Position of the Signature; English Rule.** — The place of signature to the will is insisted upon more strictly by some codes than others. The Statute of Frauds merely required that the will should be "signed" by the testator; and hence, a will, intended as such, and expressed in the testator's own handwriting, which commenced "I, A. B., do declare this to be my last will," etc., was treated as made in literal compli-

¹ See 3 Lev. 1; 1 Ves. Jr. 12; *Smith v. Evans*, 1 Wils. 313; *Wright v. Wakeford*, 17 Ves. 458; *Pollock v. Glassell*, 2 Gratt. 439; 1 Wms. Exrs. 77; 1 Jarm. Wills, 78. It may be shown by oral testimony that the seal on a will was affixed by the testator's direction. *Pollock v. Glassell*, *supra*.

² See *Emerson*, Goods of, L. R. 9 Ir. 443, where a testator affixed a seal with his initials, placed his finger on the seal, and called it his "hand and seal." This was deemed a sufficient signing.

³ *Supra*, § 215. A misnomer in the

signature may aid in determining an issue of forgery. *McGuire v. Kerr*, 2 Bradf. 244.

⁴ *Douce*, Goods of, 2 Sw. & Tr. 593.

⁵ *Clarke*, Goods of, 1 Sw. & Tr. 22.

⁶ *Ib.*

⁷ 1 Jarm. Wills, 78; *Redding*, Goods of, 2 Robert. 339; 5 Notes Cas. 553; *Long v. Zook*, 13 Penn. St. 400.

⁸ *Bryce*, Goods of, 2 Curt. 325.

All such errors, discrepancies, or omissions, may be corrected, reconciled, or supplied by proof *aliunde*.

ance with the act, though no signature was added at the end.¹ But the mischief of setting up holographic wills which were likely enough to have been no more than the rough sketch of a will was apparent enough when the Statute of Victoria was framed. That statute, as we have just seen, designated the foot or end of the will, as the place where the testator should write his signature.²

Doubts soon arose, however, in the construction of 1 Vict. c. 26 (1837), on this very point of a signature at the foot; for testators would carelessly sign far below where the will itself was written, or at the foot of the attestation clause, or in other out of the way places; and the question had to be decided whether the statute was thus complied with or not. At first inclined to a liberal interpretation, the courts soon settled upon a strict one, on the ground that the policy of the legislature was to guard against fraudulent additions to a will after the testator had executed it; and in consequence the intentions of many who had not closely marshalled the body of the will behind the maker's own signature were frustrated.³ Hence was enacted afterwards the Stat. 15 Vict. c. 24 (1852), which somewhat verbosely explained the former act, and brought within its remedial scope not only future wills, but those already made, upon whose defective execution the settlement of the estates concerned had not yet been directed. The purport of this explanatory act was to make the precise place of signature of minor consequence, provided the signa-

¹ *Cook v. Parsons*, Pre. Ch. 184; 3 Lev. 1; *Coles v. Trecothick*, 9 Ves. 249; 1 Jarm. Wills, c. 79; 1 Wms. Exrs. 78.

² *Supra*, § 300.

³ 1 Wms. Exrs. 78; *Willis v. Lowe*, 1 Robert. 618; *Smeer v. Bryer*, 1 Robert. 618; 6 Moore P. C. 404.

But probate of a will has been allowed under Stat. 1 Vict. c. 26, § 9, where it concluded, "signed and sealed as for the will of me, C. E. T. W., in the presence of us, D. H. and E. H." as being signed at the foot or end thereof. *Woodington Re*, 2 Curt. 324. And see 2 Sw. & Tr. 12. In such a case the court should be satisfied that the name

as thus written was intended as a signature. See also *Pearn, Goods of*, 1 P. D. 70; *Walker, Goods of*, 2 Sw. & Tr. 354; *Casmore, Goods of*, L. R. 1 P. & D. 653. The provisions of 15 Vict. c. 24 strengthen the favorable interpretation that, under all the circumstances, the testator intended his signature in the testimonium clause to serve as the real signature under the will. *Pearn, Goods of, supra*. A similar case was *Huckvale Re*, L. R. 1 P. & D. 375, where the only signature of the instrument appeared in the attestation clause, which was squeezed into what had been a blank space.

ture itself was so placed at or after, or following, or under, or beside, or opposite to the end of the will, that it could be gathered from the face of the will that the testator intended thereby to give the instrument effect as his will.¹ While a more liberal turn is thus given to the latest decisions, there remains uncertainty still, as to precisely what shall constitute a valid signature in respect of position, so as to take the whole will under its cover.²

¹ The language of Stat. 15 Vict. c. 24 (known as the Wills Amendment Act of 1852) may be studied in 1 Wms. Exrs. 79-82. And see next note.

Under neither of these wills acts of Victoria is it provided that the will shall be written continuously. Hence there might be blank intermediate spaces in the body of the will, where the policy of the statute would fail to protect the will against a fraudulent insertion subsequent to the execution, in spite of its pains to prevent addition at the foot and before the signature. See 1 Robert. 669, 705; 1 Wms. Exrs. 82. Where a lithographed form of will was used, the lithographed clauses being on the first page only, and the testator wrote the will mainly on the second and third pages, leaving the fourth page blank, and signed and executed at the foot of the first page instead of at the end of her writing, the court sustained the signature as a due compliance with the statute of 15 Vict. c. 24. This conclusion was ingeniously reached; namely, by supposing (as the whole sense of the will permitted) that the testator began on the second and third pages, and so came round to the first page, making the lithographed clauses in effect the conclusion of the will. Wotton, Goods of, L. R. 3 P. & D. 59.

² In 1 Wms. Exrs. 80, 81, the decisions on these statutes of Victoria, relative to signing at the foot, etc., are quite fully cited. The Wills Amendment Act of 1852, § 1, declares expressly that no signature shall be operative to give effect to any disposition or direction

which is underneath or which follows it. But it is held that where, from the obvious sequence and sense of the context, it appears, to the satisfaction of the court, that the signature of the deceased really followed the disposing part of the will, the instrument will be entitled to probate without literal regard to the place it may occupy above on the paper. Kimpton, Goods of, 3 Sw. & Tr. 427. In a recent case the will of the deceased had an imperfect attestation clause, and the name of the testator appeared written beneath the signatures of the attesting witnesses, and, both witnesses being dead, no evidence could be given as to the order in which the signatures were made. Nevertheless the will was admitted to probate. Puddephate, Goods of, L. R. 1 P. & D. 97.

The Wills Amendment Act says that "no such will shall be affected by the circumstance that the signature shall not follow or be immediately after the foot or end of the will, or by the circumstance that a blank space shall intervene between the concluding word of the will and the signature, or by the circumstance that the signature shall be placed among the words of the *testimonium* clause or of the clause of attestation, or shall follow or be after or under the clause of attestation, either with or without a blank space intervening, or shall follow or be after or under or beside the names or one of the names of the subscribing witnesses, or by the circumstance that the signature shall be on a side or page or other portion of the paper or papers containing the will

§ 312. **Position of the Signature; American Rule.**—The statutes of several American States expressly require the testator to sign his name at the end of the will; as in New York, Pennsylvania, Ohio, Kansas, California, and Arkansas.¹ And unquestionably this is the most natural and proper place of signature; the attestation clause following, if there be one. But most of our codes are silent on this point; and the principle which they inculcate is, rather, that the place of signature is of secondary consequence, provided only that, wherever the testator may have chosen to place his name, he meant it to stand for his final signature, and thereby authenticate the entire instrument as propounded.²

whereon no clause or paragraph or disposing part of the will shall be written above the signature, or by the circumstance that there shall appear to be sufficient space on or at the bottom of the preceding side or page, or other portion of the same paper on which the will is written to contain the signature; and the enumeration of the above circumstances shall not restrict the generality of the above enactment." Stat. 15 Vict. c. 24, § 1.

In order to obviate the objection that the will was not signed at the foot or end, the court has in some instances felt justified in regarding a portion running below the signature as forming no part of the will, and granting probate exclusive of that portion. See 1 Wms. Exrs. 80, and numerous citations; 1 Robert. 189, 424, 638, 755; 2 Robert. 116. Thus a testator, after signing his name to his will in presence of two witnesses, added a clause to it, the writing being crowded into the space above and beside the signature. Immediately afterwards the witnesses signed their names. The court granted probate of the will exclusive of this clause, on the ground that the testator did not sign or acknowledge his signature to the will as containing it. Arthur, Goods of, L. R. 2 P. & D. 273. But where the last sentence contained in a will executed by the deceased commenced immediately above his

signature, and was continued in three short lines to the left and extending slightly below the signature, this sentence was included in the probate, the evidence showing that it was written in before the testator signed, and that the attestation act followed. Ainsworth, Goods of, L. R. 2 P. & D. 151. And see Woodley, Goods of, 3 Sw. & Tr. 429.

In *Hunt v. Hunt*, L. R. 1 P. & D. 209, a will ended in the middle of the third page of a sheet of foolscap, and, the lower half of the page being left blank, the attestation clause and the signatures were written on the top of the fourth page. It was held that the will was duly executed. See *Hughes, Goods of*, 12 P. D. 107; *Margary v. Robinson*, 12 P. D. 8.

¹ 1 Jarm Wills, 105, Bigelow's note; 13 Barb. 17; *Hewitt's Will*, 91 N. Y. 261; *Stricker v. Groves*, 5 Whart. 386; 1 Wms. Exrs. 77, *Perkins's Note*; *Soward v. Soward*, 1 Duv. 126; *Glancy v. Glancy*, 17 Ohio St. 134. And as to wills of real estate in New Jersey, see *Combs v. Jolly*, 2 Green Ch. 625.

² The rule is essentially that under the English Statute of Frauds, upon which our wills acts are based. *Supra*, § 255; *Hall v. Hall*, 17 Pick. 373; *Upchurch v. Upchurch*, 16 B. Mon. 102; *Ramsey v. Ramsey*, 12 Gratt. 664; *Adams v. Field*, 21 Vt. 256; *Armstrong v. Armstrong*, 29 Ala. 538.

From either legal standpoint, anything which appears to have been interpolated, added, or altered after the signature was affixed to the will fails of authentication unless adopted by the maker before his will is acknowledged, attested, and completely executed; nor should his signature take effect at all unless fully intended by him as such; and the only radical difference in policy in our codes appears to consist in the formal precautions which the legislature may have taken to prevent either apprehended mischief.¹

The objectionable character of the old English doctrine of a testator's signature, in construction of the Statute of Frauds, is well pointed out in a late Virginia case (1890). The Virginia courts followed reluctantly the old English rule, which made a testator's name written by him in the body of the paper serve as a final execution; thus depriving the instrument of all proof upon its face that the testamentary intent was final. At length in 1850 was enacted in this State a statute, based upon the English act of 1 Vict. c. 26, which required that the signature should be "in such manner as to make it manifest that the name is intended to be as a signature." Under this latter enactment, where a paper wholly in the testator's handwriting began "I, A. B., declare this to be my last will and testament," but nowhere else contained the testator's signature, it was held that there was no valid will, notwithstanding the document was enclosed in a sealed envelope on which was written in the testator's handwriting, "My will, A. B." *Warwick v. Warwick*. 86 Va. 596.

As for States whose codes originated in the civil law, there are special reasons why the testator's name in the body of the writing should not be treated as a signature when not intended as such, even though the writer supposed no signature necessary. In a recent Louisiana case this doctrine is deduced from the famous code of the State. That code, art. 1588, provides that holographic wills shall be "entirely written, dated,

and signed, in the handwriting of him or those making them." This article was copied from the Code Napoleon, which in turn was taken from an ordinance of Louis XV. The jurisprudence of France has been uniformly to the effect that the signature must be at the end of the testament, or, at least, that no disposition following the signature can avail as a will. *Armant's Will*, 43 La. Ann. 310. Cf. § 255, *supra* and case cited.

¹ Some late New York cases apply the local statute, which requires the will to be signed and witnessed at the end, so as to reject what may happen to follow these signatures as constituting no part of the will. A will was written upon two sides of a piece of paper and signed by the witnesses at the bottom of the first and at the top of the second side. An important provision followed these last signatures, and it was held that the execution did not embrace it. *Hewitt's Will*, 91 N. Y. 261. An important provision upon the fourth page of a will following a signature and attestation at the foot of the third page was likewise rejected *in toto* from the probate; nor would the court consent to treat that provision as an interlineation, nor as valid in part and invalid in part. *O'Neil's Will*, 91 N. Y. 516. See also *Conway's Will*, 124 N. Y. 455, where (three judges dissenting) an execution at the end of the first page where the will was continued to the second page, with reference back was held invalid. 95 N. Y. 145 was here distinguished.

Some American cases seem to consider that the testator's purpose and intention to sign must appear on the face of the will;¹ but this is perhaps too narrow a view to take. Where, indeed, the testator's name was written only at the commencement of the will, the end being left blank, and nothing on the face of the paper indicates affirmatively that he intended it as his signature, the presumption may well be that in the legal and natural sense he did not sign.² But his subscription at the end, not of the testimonium, but of the attestation clause (or in the midst of the latter) indicates the contrary rather;³ and such a subscription accompanied by attestation is even held to comply with a statute which requires the subscription to be "at the end of the will."⁴ The acknowledgment of the instrument before attesting witnesses (who subscribe their names), without alluding to any further act of signing or otherwise qualifying the execution, may now be taken as a strong circumstance in favor of intended signature, wherever the maker's name may be found; for if he fails to sign, it is probably through inadvertence; and, *vice versa*, his signature without an attestation can avail little in modern

In Kentucky, too, it is held that where all of the names must appear at the end of the will, a signature by the testator, so separated by turning a sheet from that of the witnesses and from the body of the will itself, that fraudulent additions might be made to the instrument, is not a valid execution. One object of such a statute, it is here said, is to prevent fraudulent additions from being made to a will. *Soward v. Soward*, 1 Duv. 126. But no rule can be laid down as to what is an unreasonable or unnecessary blank space in such cases. *Ib.*

We apprehend that under legislation like the above, American courts of probate will show no less solicitude than the English tribunals, to protect a clause crowded at the foot of a will about the signature of the testator, without too literal a construction of the statute, provided the fact of its insertion before the execution of the will clearly appears and

no suspicion of bad faith or reckless error in signing clings to the transaction.

Where the final clause of a will which appoints an executor appears below the testator's signature, the question of whether the will is invalid, or such clause surplusage, depends upon when it was inserted. 6 Dem. 298. But if the will was all prepared at one time for execution, and the testator's signature precedes the final clause which appoints executors, the will is not signed "at the end thereof," within the requirement of local statute. *Wine-land's Appeal*, 118 Penn. St. 37.

¹ See *Waller v. Waller*, 1 Gratt. 454; *Graham v. Graham*, 10 Ired. 219; 1 Wms. Exrs. 77, Perkins's note.

² *Ramsey v. Ramsey*, 13 Gratt. 664. Cf. *Watts v. Public Admr.* 4 Wend. 168.

³ *Hallowell v. Hallowell*, 88 Ind. 251.

⁴ *Younger v. Duffie*, 94 N. Y. 535; *Cohen's Will*, 1 Tuck. 286; 5 Dem. 19.

policy. And there seems no reason why the surrounding circumstances of execution may not be investigated to resolve a doubt and conclude the issue justly by the evidence.¹ For after all these statute precautions, the integrity and genuineness of the instrument should be the main concern at the probate.

§ 313. **Whatever the Place, a Signing must have been intended.**—Whatever the local position of the signature by statute permission, the true principle is, that it must have been placed there with the design of finally authenticating the instrument, no further signature on the maker's part being contemplated. A name originally written without such final design may, it is true, have that final effect afterwards, by the testator's subsequent adoption of the signature as his final one; and such would probably be presumed his intention if he acknowledged the instrument as his will to the attesting witnesses without alluding to any further act of signing.² But if, on the other hand, the testator intended, to the last, another signature which he never made, the will should be considered as unsigned;³ and so, too, it would appear, if the testator supposed no signature at all essential; to say nothing of its incomplete execution in other respects which the statute made essential.

§ 314. **One Signature or more for Several Sheets.**—One signature may suffice for several sheets of paper; and the natural, if not the imperative place for signing is where the will ends on the last sheet; though, as a precaution against fraud, a maker sometimes places his name on the consecutive sheets. The fastening together of the sheets as found at the

¹ Where the statute requires the will to be signed "at the end" and witnessed, and it appears in a case that the testator alone signed, and called later for his will "to finish it," added a bequest and then had the witnesses sign, without signing anew, the whole will must be held invalid. *Glancy v. Glancy*, 17 Ohio St. 134.

² 1 Jarm. Wills, 79. *Semble*, the in-

tention to sign again may be shown by parol evidence, where doubt is left on the face of the will, as a foundation for admitting proof *aliunde*. *Right v. Price*, 1 Dougl. 241; *Ramsey v. Ramsey*, 13 Gratt. 664.

³ 1 Jarm. Wills, 79. This point was apparently decided in *Right v. Price*, 1 Dougl. 241.

testator's death, is presumed to be the same as when the will was executed; and in absence of proof to the contrary, their identity and consecutive order should be taken accordingly, as constituting the full and genuine will of the deceased.¹ But the question whether or not all the sheets of the will as propounded were attached at the time of signature, or there has been a fraudulent or informal change since, is to be decided as an issue of fact upon all the evidence.²

Where the testator signs the will on several sheets, or in different places, the last signature, if at the end of the will, is the efficient one.³

§ 315. One Signature where Will has been written by Portions.—Where, again, it appears that a will has been written by portions, various clauses being composed and inserted at different times, one signature and attestation applies sufficiently to each and all of the dispositions contained in the instrument as they finally stood at the date of execution.⁴

§ 316. Signatures may be upon Paper fastened to the Will.—A valid signature may be made on a separate piece of paper which is stuck or fastened to the body of the will, and contains nothing but the signature and attestation;⁵ provided it be shown that the execution was *bona fide* and regular in other respects, and the paper duly fastened at or before the time of attestation.⁶

§ 317. Wills of Blind, Disabled and Illiterate Persons; how made known to them.—The civil law required that the written will of a blind person should be read over to him and approved by him in presence of the subscribing witnesses.⁷ Our common law lays down no such imperative rule; but with regard to both blind and illiterate, and all who cannot

¹ Rees v. Rees, L. R. 3 P. & D. 84; Marsh v. Marsh, 1 Sw. & Tr. 528; Tonnele v. Hall, 4 Comst. 140; Wikoff's Appeal, 15 Penn. St. 281; Ela v. Edwards, 16 Gray, 91; Martin v. Hamblin, 4 Strobb. 188.

² Ginder v. Farnum, 10 Penn. St. 98.

³ Evans's Appeal, 58 Penn. St. 238.

⁴ Catrall, Goods of, 4 Sw. & Tr. 419.

⁵ Horsford *Re*, L. R. 3 P. & D. 211; 2 Sw. & Tr. 362; Cook v. Lambert, 3 Sw. & Tr. 46.

⁶ 32 L. J. Prob. 182; 1 Jarm. Wills, 79.

⁷ 1 Wms. Exrs. 19; Swinb. pt. 2, § 11.

read what is written out as their will, requires satisfactory proof of some kind to the effect that the testator knew and approved of the contents of the will which was executed as his own.¹ Such a will may be read over to the testator before signing, apart from his witnesses;² or it may be shown that the contents were correctly made known to him without any formal reading at all;³ provided it appear, on the whole, that the instrument as drawn up and executed constituted his own testamentary disposition as intended by him. Less than this, however, is unacceptable; and where the will, without being read over or examined, is signed by the testator upon an assurance that it has been prepared according to his instructions, when in point of fact it has not been, probate should be refused.⁴ Corresponding considerations may apply to the wills of those who are deaf, but not blind; and a testator of this latter description would fitly assure himself that the instrument is correct by reading it over instead of having it read to him; and here, once more, the controlling question would be whether the instrument in question embraced his testamentary intentions.

§ 317 *a*. **Declarations of Testator inadmissible on the issue of Execution.** — The declarations of a testator, before or after making a will, are inadmissible on the issue of its execution.⁵

¹ *Ib.*; *Axford R.*, 1 Sw. & Tr. 540; 2 Cas. temp. Lee, 595; *Martin v. Mitchell*, 28 Geo. 382; *Wampler v. Wampler*, 9 Md. 540; *Day v. Day*, 2 Green Ch. 549; 3 Phillim. 455, note; 6 Dem. 478; *Worthington v. Klemm*, 144 Mass. 167. Having the will read over in presence of the witnesses and then executing is a good fulfilment of requirements under the New York code, in case of the blind. See *Moore v. Moore*, 2 Bradf. 261.

² *Martin v. Mitchell*, 28 Geo. 382; *Wampler v. Wampler*, 9 Md. 540; 2 Dev. Law, 291.

³ 1 Wms. Exrs. 19; *Fincham v. Edwards*, 3 Curt. 63; 4 Moore P. C. 198; *Boyd v. Cook*, 3 Leigh. 32; *Hess's Appeal*, 43 Penn. St. 73; 11 Phila. 161.

We need hardly observe that it behooves every testator who is illiterate, blind, or otherwise much dependent upon the accuracy and good faith of those about him, to be especially heedful that his last wishes are correctly expressed in the instrument which he executes, and that no fraud or imposition is practised upon him.

The court, moreover, should take especial care to avoid, in such cases, rulings upon the point of capacity or free will which, though abstractly correct, might mislead the jury. *Bull's Will*, 111 N. Y. 624.

⁴ *Waite v. Frisbie* (Minn.), 1891.

⁵ *Kennedy v. Upshaw*, 64 Tex. 411, and cases cited; *Couch v. Eastham*, 27 W. Va. 796.

CHAPTER III.

ATTESTATION AND SUBSCRIPTION BY WITNESSES.

§ 318. **Attestation or Subscription independently of Statute.**—In England wills of personal property made before January 1, 1838, needed no attestation or subscription in order to operate;¹ custody was their sufficient publication, although it was safer and more prudent, as the jurists used to say, and left less in the breast of the ecclesiastical judge, if they were published in the presence of witnesses.² Some of the older authorities, indeed, were supposed to lay it down that a publication before two witnesses was indispensable; but what they meant was probably to recommend so prudent a course, or else to refer to that fundamental rule of the civilians which required two witnesses to prove every fact.³ That the testament itself had to be subscribed by two or more witnesses, or a single one, to give it validity, was neither affirmed nor pretended.⁴

But witnesses were often called in, nevertheless, to attest one's will; and after the Statute of Frauds rendered such attestation necessary for wills of real estate, it became quite common for a testator to waive the legal exemption in favor of his personalty, and guard the final disposition as a whole by a subscription; his three witnesses signing their names after an attestation clause. Hence came the rule, that where an instrument drawn up as one's will professed to dispose of both real and personal property, or even personalty alone, but an attestation clause was appended without signatures, it should be presumed that the testamentary intention never took full

¹ 1 Wms. Exrs. 84.

pt. 1, § 3, pl. 13; Godolph. pt. 1, c. 21,

² Com. Rep. 452; *Miller v. Brown*, 2 § 1.

Hagg. 211.

⁴ *Brett v. Brett*, 3 Add. 224; 1 Wms.

³ 1 Wms. Exrs. 84, citing *Bracton*, Exrs. 85.

lib. 2, f. 61; *Fleta*, lib. 2, f. 125; *Swinb.*

effect.¹ But this rule was one of presumption merely, proceeding, of course, upon the theory that the incomplete execution showed an incomplete purpose; and this presumption might be repelled by slight evidence, showing that in fact the testator had intended it to operate without an attestation, so far, at least, as his personal property was concerned, or that act of God prevented him from finishing the instrument to which his mind had fully and finally assented.²

§ 319. **Attestation under Modern Statutes.**—As to wills, however, which are made at the present day in compliance with modern statutes, the rule of attestation by subscribing witnesses is far more widely imperative. Thus in England, by the Modern Wills Act, 1 Vict. c. 26, § 9, it is enacted that no will made on or after January 1, 1838, shall be valid, unless the signature is “made or acknowledged by the testator in the presence of two or more witnesses present at the same time”; and these witnesses are to attest and subscribe the will in the testator’s presence, no particular form of attestation, however, being necessary.³ As for any will or devise of real estate, the Statute of Frauds, 29 Car. II. c. 3, had for a century and a half made the attestation of at least three witnesses indispensable.⁴

¹ 1 Wms. Exrs. 85; 1 Add. 154, 159; Walker v. Walker, 1 Meriv. 503; Mathews v. Warner, 4 Ves. 186; 5 Ves. 23. Where there was no regular attestation clause, but only the word “witnesses,” non-attestation by witnesses afforded a much slighter inference of incomplete testamentary purpose. *Doker v. Goff*, 2 Add. 42.

² *Buckle v. Buckle*, 3 Phillim. 323; 1 Wms. Exrs. 85, 86; 1 Hagg. 252, 551, 596, 698.

A first step was taken by the codifiers in some of our States, towards requiring attestation in all wills, by a statute which prescribed full formalities of execution, not only for devises, but where a will purported to dispose of both real and personal property. See 15 Pick. 393.

Holograph wills, as we have seen,

which make a special feature of the legislation of various States, dispense with attestation by witnesses altogether, provided the will be wholly written out, signed, and dated by the testator. *Supra*, § 255. Hence in Virginia such a will was lately sustained as valid, even though it contained an unsigned attestation clause. And another paper of a testamentary character, bearing the same date, and found folded up with such will, and similarly written and signed, was pronounced a valid codicil. *Perkins v. Jones*, 84 Va. 358. And see *Soher’s Estate*, 78 Cal. 477, which inclines to treat one witness’s signature to a holograph will as amounting to an incomplete attestation.

³ See App.; 1 Wms. Exrs. preface.

⁴ A will of lands, under the Statute of Frauds, § 5, must be “attested and sub-

A comparison of the language used in these two great enactments will show various important points of difference between them. The most obvious one is, that two witnesses sufficiently attest all wills made after the year 1837, whether relating to real or to personal property, or to both; three witnesses being no longer requisite for any will or devise. Other points for comparison will appear in the course of this chapter.¹

In the several American States will be found local statutes with corresponding differences of detail; so that no single principle can be laid down to embrace the entire doctrine. Witnesses vary in number; in some States, as under the old Statute of Frauds, they are to "attest and subscribe" the will, and nothing is said about requiring a testator to "make or acknowledge" the will in their presence; nor do all States insist that all the witnesses shall attest and subscribe in the presence of one another, but merely in the presence of the testator, another feature copied from the earlier English enactment. In fact, our American wills acts appear based in expression less upon the act of Victoria than that of Charles II.; yet they vary quite as widely in details as do these English enactments, and the latest tendency conforms more to the statute of Victoria or that of the New York code, which is somewhat similar.²

scribed in the presence of the deviser, by three or four credible witnesses." See 1 Wms. Exrs. 87; 1 Jarm. Wills, 77.

¹ The Statute of Frauds required witnesses to attest and subscribe the will; but that of Victoria requires that the testator's signature be "made or acknowledged" in their presence. Attestation in the presence of the testator, though not of each other, might have sufficed under the earlier statute, but it does not so clearly under the later. And as to publication and form of attestation, the statute of Victoria has special provisions not found in the Statute of Frauds. These matters will be examined presently.

² A good example of the older form of expression is found in the Massachusetts code, which requires the will to be "attested and subscribed in his [the testator's] presence by three or more competent witnesses." Mass. Gen. Stat. c. 92, § 6. The turn of this phrase is like that of the old Statute of Frauds. But the New York enactment, which so many other legislatures follow, is expressed in various sentences embodying consecutive directions, viz.: the subscription shall be made by the testator in the presence of each of the attesting witnesses, or shall be acknowledged by him to have been so made, to each of the attesting witnesses; there shall be a declaration by the testator, etc.; there

§ 320. **Number of Subscribing Witnesses required.**—First, then, as to the number of subscribing witnesses required. By the present English statute, two witnesses at least are requisite, whatever the kind of property disposed of.¹ As for this country, there must be at least three witnesses by the rule now or lately prevalent in most parts of New England; also in South Carolina, Florida, and Georgia.² Two witnesses, however, suffice in the majority of American States, including Rhode Island, New York, New Jersey, and most of the Southern and Western States.³ Upon the exceptional rules of various States as to attestation for different kinds of property or non-attestation when a holographic will is made, we have already touched.⁴

§ 321. **Signing or acknowledging before the Witnesses; English Rule.**—Next, we consider the signing or acknowledgment of the will before the witnesses. Upon this point is found a difference of statute expression and hence of statute construction, which is of especial consequence where the testator signs his will and then seeks out witnesses afterwards. The old Statute of Frauds required witnesses to attest and subscribe the will; which was interpreted to mean, that the testator was not obliged to sign in the presence of the witnesses, provided he made before them a due acknowledgment of the instrument; and, furthermore, that a due acknowledgment in fact did not necessitate his acknowledging in words that the instrument was his will, nor apprising the witnesses in any way of the nature or contents of the instrument they were called upon to attest. A testator's declaration before three witnesses that the instrument produced and already

shall be at least two attesting witnesses, each of whom shall sign his name as a witness at the end of the will at the request of the testator. 2 N. Y. Rev. Stats. p. 63, §§ 40, 41.

¹ Acts 1 Vict. c. 26, and 29 Car. II. c. 3, § 5, cited preceding section.

² 1 Jarm. Wills, 77.

³ See 1 Jarm. Wills, 77, Bigelow's note; also the various local codes, some of which appear to have reduced the

number of indispensable witnesses since 1870. Cf. also for latest statutory changes, Stimson's Am. Stat. Law, § 2644.

Where a paper purporting to be a will is signed "A by B" and witnessed "Witness C," B is not one of the two subscribing witnesses within the meaning of the statute. *Peake v. Jenkins*, 80 Va. 293.

⁴ *Supra*, §§ 254-256.

signed by him was his will, was equivalent to signing it before them.¹ And more than this, though he merely asked the witnesses to sign, as such, the paper he produced which bore his signature, and they did so, neither seeing his signature nor knowing what was the nature of the instrument thus attested, the statute, nevertheless, was satisfied; supposing of course that this whole transaction imported consistently the full testamentary intent on his part.²

But the statute of Victoria uses a different language. The execution here prescribed makes "the signature," and not, as before, "the will," the subject of acknowledgment in presence of the witnesses. A stricter rule of construction has arisen in consequence, and the result of the latest cases appears to establish: (1) That the testator sufficiently acknowledges his signature, where he produces the will, with his signature visibly apparent on its face, and requests the witnesses to subscribe it;³ (2) but not where the witnesses neither saw nor could have seen the signature, especially if he did not explain the instrument to them.⁴ And stress being here laid upon the signature, the main requirement is that the witnesses saw or might have seen it, as written by the testator consistently with the full and *bona fide* intent on his part of executing his will then and there. For if the signature was

¹ *Ellis v. Smith*, 1 Ves. Jr. 11, overruling Lord Hardwicke's doubt expressed in *Gryle v. Gryle*, 2 Atk. 176; *Casement v. Fulton*, 5 Moore P. C. 138.

² *British Museum v. White*, 6 Bing. 310; 7 Bing. 457; 1 Rob. 14; *Gaze v. Gaze*, 3 Curt. 451. "When we find the testator knew this instrument to be his will; that he produced it to the three persons, and asked them to sign the same; that he intended them to sign it as witnesses; that they subscribed their names in his presence, and returned the same identical instrument to him; we think the testator did acknowledge *in fact*, though not *in words*, to the three witnesses, that the will was his." *Tin-*

dal, C. J., in *British Museum v. White*, *supra*.

³ 1 Wms. Exrs. 88, and cases cited; *Huckvale, Goods of*, L. R. 1 P. & D. 378; *Davis Re*, 3 Curt. 748; 1 Jarm. Wills, 108.

⁴ 1 Wms. Exrs. 88; 1 Jarm. Wills, 88; *Swinford, Goods of*, L. R. 1 P. & D. 630; *Gunstan, Goods of*, 7 P. D. 102.

If the witnesses neither saw nor might have seen the signature, it is not even sufficient that the testator should expressly declare that the paper to be attested by them was his will. 1 Jarm. Wills, 88; *Shaw v. Neville*, 1 Jur. N. S. 408. *Beckett v. Howe*, L. R. 2 P. & D. 1, appears *contra*; but this is overruled by *Gunstan, Goods of*, 7 P. D. 102.

visibly apparent on the paper thus produced to them, it is held that an express acknowledgment thereof in words may be dispensed with on the testator's part, as well as his statement that the paper is his will; that he may be reticent as to both nature and contents of the instrument;¹ that he may say "this is my will," or "this is my signature," or simply ask the witnesses to put their names under his, or request them to sign the paper, or make known his acknowledgment by gestures.² And there may even be an acknowledgment by some person in the testator's presence under circumstances of sanction and adoption by the latter, so as to satisfy the statute.³

The acknowledgment of which we have spoken is the permitted substitute for signing in presence of the witnesses. The testator (or the person in his presence and by his direction) should sign first, the witnesses afterwards; if the testator signs in presence of all the witnesses, that is enough; but where his signature was already on the paper when a witness was asked to sign, the sufficiency of his acknowledgment must be considered. It is decidedly preferable that a testator should avoid all such nice controversy, by bringing the witnesses all into his presence together and then signing his will before them.

§ 322. The Same Subject; Presumption of Due Attestation.

— It is possible that the testator's signature was on the will where the witnesses might have seen it, but inadvertently did not; it is possible, too, that the precise circumstances of attestation may have faded from the recollection of a witness

¹ *Keigwin v. Keigwin*, 3 Curt. 607; *Huckvale Re*, L. R. 1 P. & D. 375.

² 1 Wms. Exrs. 88, and cases cited; *Gaze v. Gaze*, 3 Curt. 451; 3 Curt. 172, 547; 1 Jarm. Wills, 108, 109; 2 Rob. 337.

³ 1 Jarm. Wills, 108; 1 Curt. 908; *Inglesant v. Inglesant*, L. R. 3 P. & D. 172. Such cases seldom arise; and the acts and conduct of the testator on the occasion should be very carefully scrutinized in such cases. With one excep-

tion all the English precedents up to 1874, under either the new statute or the old, showed some word or act of the testator himself by way of acknowledgment. That exception (6 No. Ca. Suppl. 12) is discussed in *Inglesant v. Inglesant*, *supra*. See *Morritt v. Douglas*, L. R. 3 P. & D. 1.

On a re-execution, it is enough to merely acknowledge the signature made on a former execution. 17 Jur. 1130; 1 Jarm. Wills, 109.

by the time the will is presented for probate. Where all appears regular on the face of the will a due attestation should be presumed; and direct evidence that the name of the testator was visible on the face of the will when it was produced for witnesses to sign is certainly not necessary.¹ The result of the cases under the statute of Victoria, where acknowledging and not signing in presence is relied upon, or in other words, that the testator's signature was already upon the will when it was produced to the witnesses for their attestation, appears to be this: that in the absence of direct evidence on the point one way or the other, the court may, independently of any positive evidence, investigate the circumstances of the case, and may form its own opinion from these circumstances, and from the appearance of the document itself, whether the name of the testator was or was not upon it (or rather might not have been seen), at the time of the attestation.² But the court should mainly consider whether the witnesses did not see, or at least have an opportunity of seeing, the testator's signature when they attested; for if they did not, it is immaterial that the signature was actually there, but hidden from them.³

As with the general presumption in favor of a due attestation where all appears regular on the face of the will, so

¹ See *Wright v. Sanderson*, 9 P. D. 149; § 347 *post*.

² Sir J. P. Wilde (Lord Penzance) in *Huckvale, Goods of*, L. R. 1 P. & D. 375. In this case, the two attesting witnesses did not know whether or not the testator's signature was on the paper when they subscribed it. But the court under all the circumstances decided that it probably was there, and granted a probate. See also *Gwillim v. Gwillim*, 3 Sw. & Tr. 200; *Cooper v. Bockett*, 4 Moo. P. C. 419. These cases seem to discredit *Hammond, Goods of*, 3 Sw. & Tr. 90; and see *Archer, Goods of*, L. R. 2 P. & D. 252.

³ *Gunstan, Goods of*, 7 P. D. 102, which seems to give a new turn to the propositions as announced by Lord Penzance, *supra*. In *Daintree v. Butcher*,

13 P. D. 102, 107, this question is discussed somewhat further. The signature of the testatrix was upon the codicil before the witnesses came into the room. They, in her presence, signed their names below her signature, which was so placed that they could have seen it. The testatrix had called them in, but she did not tell them that it was a testamentary paper, nor what kind of instrument it was. They were asked to sign, and they could have seen the signature. This was held a sufficient compliance with the statute; whereas, as it would seem, an acknowledgment by any testator that the paper was his will would not be enough unless the witnesses had opportunity to see the signature.

should it be presumed that the testator signed the instrument first and before either of his witnesses subscribed.¹

§ 323. **Signing or acknowledging before the Witnesses ; American Rule.**—In our American States, a corresponding variance of statute expression calls for variance in interpretation. Subject, however, to the language and policy of each local enactment, we may say that the broad American principle requires the testator either to sign or acknowledge before his attesting witnesses. In the latter instance, is it the acknowledgment of his will or the acknowledgment of his signature that the local statute keeps in view? To this inquiry let us direct our attention : first of all observing, that if due acknowledgment is made before the witnesses, the testator need not sign his will in their presence.²

§ 324. **The Same Subject ; Rule in Massachusetts, etc., where Will is to be acknowledged.**—In Massachusetts and various other States the language of the Statute of Frauds is essen-

¹ *Allen v. Griffin*, 69 Wis. 529. See § 328. It should be borne well in mind that neither the English Statute of Frauds, nor an American code which copies it, requires a testator to sign in the presence of the witnesses, but only that the witnesses shall sign in the presence of the testator. See *Stirling v. Stirling*, 64 Md. 138.

² There are numerous decisions which establish the principle for this country, as in England, that acknowledgment is a sufficient substitute for signing in the presence. See 1 Jarm. Wills, 80, Bigelow's American note, showing that this rule is at least well established in Arkansas, Georgia, Indiana, Illinois, Kentucky, Massachusetts, Missouri, Vermont, and Virginia. See *Abraham v. Wilkins*, 17 Ark. 292 ; *Webb v. Fleming*, 30 Ga. 808 ; *Reed v. Watson*, 27 Ind. 443 ; *Crowley v. Crowley*, 80 Ill. 469 ; *Sechrest v. Edwards*, 4 Met. (Ky.) 163 ; *Chase v. Kittredge*, 11 Allen, 49 ; *Cravens v. Faulconer*, 28 Mo. 19 ; *Roberts v. Welch*, 46 Vt. 154 ; Parra-

more *v. Taylor*, 11 Gratt. 220 ; 11 Phila. 161. This is also the rule of Connecticut, Iowa, and New Hampshire. Canada's Appeal, 47 Conn. 450 ; *Convey's Will*, 52 Iowa, 197 ; *Welch v. Adams*, 63 N. H. 344. The present New York code provides for the sufficiency of either a subscription in presence of the witnesses, or an acknowledgment to them. *Lewis v. Lewis*, 11 N. Y. 220. The Maryland rule conforms with the statement in the text. *Stirling v. Stirling*, 64 Md. 138.

But the local codes are not found uniformly flexible in this respect. Thus the Alabama statute now, or formerly, favored only wills of personality in this respect. *Henry, Ex parte*, 24 Ala. 638. And under the New Jersey code, which the courts literally construed, the testator had formerly no option when devising land but to "sign" in presence of the witnesses. *Combs v. Jolly*, 2 Green Ch. 625 and cases cited. But this statute appears since to have been changed. *Alpaugh's Will*, 8 C. E. Green, 507.

tially followed; and accordingly the acknowledgment prescribed for a testator relates simply to the will and its attestation. Thus, it is held, agreeably with the English line of precedents under that statute, that a testator's acknowledgment in fact is sufficient, without any particular words importing the nature or contents of the instrument; that any act which clearly indicates his intentional acknowledgment is sufficient, without any language whatever;¹ that the will may have been properly acknowledged by him, even though the attesting witnesses derive no clear idea whether the paper they subscribe is a will or some other kind of instrument;² and that, if the execution be *bona fide*, it matters not whether the witnesses saw the testator's signature or not.³ In all matters of this character clear and explicit acts are to be regarded, rather than mere form.⁴

But there are States whose courts depart from the liberal policy of the English courts in this respect. Thus, in Vermont, while acknowledgment of the will by the testator may take the place of subscription in presence of the witnesses, the rule is, that subscribing witnesses to a will must subscribe as intending a testamentary execution; and hence they must

¹ *Allison v. Allison*, 46 Ill. 61. In this Illinois case the attestation clause was read over by the scrivener in the hearing of the testator and the witnesses; the testator then handed the pen to the subscribing witnesses, and saw them sign as such, but uttered not a word while they were present; the court held, nevertheless, that this was a sufficient acknowledgment.

² A will has been repeatedly sustained in Massachusetts where no one of the witnesses knew that the attestation related to a will, nor what, in fact, was the nature of the instrument. *Osborn v. Cook*, 11 Cush. 532; *Hogan v. Grosvenor*, 10 Met. 56; *Ela v. Edwards*, 16 Gray, 91; 13 Gray, 110. So too, in various other States, Indiana, Connecticut, and Kentucky, for instance, witnesses need not know the nature or contents of the paper. *Turner v. Cook*, 36 Ind. 129; 34 Ind. 275; *Canada's*

Appeal, 47 Conn. 450; *Flood v. Pragoff*, 79 Ky. 607.

The presence of the witnesses is here designed as only an incidental benefit and security; the object of the attestation being that the party subscribing may be able to testify that the testator put his name upon the identical piece of paper upon which he puts his own, whatever the contents of that paper may prove to be. *Canada's Appeal*, 47 Conn. 450.

³ *Ela v. Edwards*, 16 Gray, 91; *Dewey v. Dewey*, 1 Met. 359.

Especially does this doctrine hold good where the witness might have seen the signature, and it was through no fault of the testator that he did not, but rather because of his own inadvertence.

⁴ See also *Allen v. Griffin*, 69 Wis. 529.

know the character of the act they are to perform, and that the instrument was a will.¹ In Missouri, under an enactment, which is nearly a transcript of the Statute of Charles II., it is held that a subscribing witness must know the instrument to be a last will, and must subscribe at the testator's request; but that neither declaration nor request need be verbal.² Finally, in South Carolina, under an act which only permitted of acknowledgment instead of signing by a liberal construction, the courts have refused to sustain a will where the testator's acknowledgment was not brought clearly home to the subscribing witness.³

§ 325. **The Same Subject: Rule in New York, etc., where Signature is to be acknowledged.**—In New York, on the other hand, and in various American States, the local code contemplates an acknowledgment of the "signature," as under the English Statute of Victoria. Four essentials are prescribed by the New York legislature, one of which is the making of the subscription in the presence of each of the attesting witnesses, "or an acknowledgment of the making of the same to them."⁴ Under this enactment it is held an insufficient acknowledgment of the testator's subscription where the paper was so folded when the witnesses signed their names that they could not see whether it was subscribed by him or not, the language of acknowledgment leaving them further to infer that it might have been a deed instead of a will.⁵ Similar enactments may be found in New Jersey⁶ and some other States.⁷ But under statutes of this character, when the testator produces a paper bearing his personal signature, requests the witnesses to attest it, and declares it to be his last will and testament, he thereby

¹ *Roberts v. Welch*, 46 Vt. 164, and cases cited.

² *Odenwaelder v. Schorr*, 8 Mo. App. 458.

³ *Tucker v. Oxner*, 12 Rich. 141.

⁴ *Lewis v. Lewis*, 11 N. Y. 220, 223. There is another specific requirement under this statute, — that of acknowledging the instrument to be one's last

will, — of which we shall speak presently; § 326.

⁵ *Lewis v. Lewis*, 11 N. Y. 220. And see *Sisters of Charity v. Kelly*, 67 N. Y. 409; *Baskin v. Baskin*, 36 N. Y. 416; *Mitchell v. Mitchell*, 77 N. Y. 596.

⁶ *Ludlow v. Ludlow*, 35 N. J. Eq. 480, 487.

⁷ *Luper v. Werts (Or.)*, 1890.

acknowledges his subscription, and complies as essentially with the statute as though he had signed in their presence.¹

Under none of the codes, English or American, as we apprehend, is it essential to due acknowledgment that the testator who produces the will with his name upon it for their attestation, should state in so many words that this is his signature.²

§ 326. **Publication or Declaration that the Instrument is a Will.** — Here let us further observe, that the later statutes of New York and New Jersey lay down expressly another essential, not usually embraced under our local wills acts: namely, that the testator shall, at the time of making or acknowledging his subscription, declare that the instrument subscribed is his last will and testament.³ Such a requirement at once repels the theory that an attestation can be legally sufficient where the testator does not distinctly apprise his witnesses of the character of the paper which they are called in to subscribe.⁴ It is seen that this specific declaration is not the substitute for signing in presence, but accompanies the final execution of the will under all circumstances. A declaration before the witnesses in express terms that the instrument is one's last will best satisfies this statute requirement; but less than this is considered acceptable, provided that, in some way, the testator makes this fact known by acts or conduct, or, better still, by words.⁵ And

¹ *Baskin v. Baskin*, 36 N. Y. 416. But *cf. Mitchell v. Mitchell*, 77 N. Y. 596, where the "signing in presence" was held insufficient.

² 1 Wms. Exrs. 88, note; 3 Curt. 172, 175; *Tilden v. Tilden*, 13 Gray, 110; *Adams v. Field*, 21 Vt. 256; *Small v. Small*, 4 Greenl. 220; *Denton v. Franklin*, 9 B. Mon. 28; *Green v. Crain*, 12 Gratt. 552; *Allison v. Allison*, 46 Ill. 61; *Reed v. Watson*, 27 Ind. 443; *Baskin v. Baskin*, *supra*; *Alpaugh's Will*, 8 C. E. Green, 507.

³ *Lewis v. Lewis*, 11 N. Y. 220, 223; *Ludlow v. Ludlow*, 35 N. J. Eq. 480, 487; *Baskin v. Baskin*, 36 N. Y. 416.

See also the California rule, as applied in *Myrick (Prob.)* 40. And see a similar provision in the Louisiana code construed in *Bourke v. Wilson*, 38 La. An. 320.

⁴ *Ib.*; *Sisters of Charity v. Kelly*, 67 N. Y. 409.

⁵ "There must be some declaration by the testator that it was his will, and a communication by him to the witnesses that he desires them to attest it as such. But this need not be done by word; any act or sign by which that communication can be made is enough. The scrivener, in the presence of the testator, says: 'This is the will of A. B.,

bearing in mind that the main object of such legislation is to repel fraud and establish a *bona fide* testament, we may

and he desires you to witness it,'—the testator standing by—is a sufficient publication or declaration. The form is immaterial. But the witnesses must know it is the will of the testator they are witnessing, and they must witness it at his request." *Mundy v. Mundy*, 2 McCart. 290. And see *Turnure v. Turnure*, 35 N. J. Eq. 437; 44 N. J. Eq. 154. Such is the liberal construction placed by New Jersey courts upon the statute in question. See also *Ayres v. Ayres*, 43 N. J. Eq. 565.

This same general conclusion the latest New York decisions appear to have reached. In *Lane v. Lane*, 95 N. Y. 494, the testator was afflicted by a partial paralysis of the vocal organs when the will was executed, and could not utter words. But he made sounds intelligible to those familiar with him, and signs easy of interpretation. It was held that the statute requiring a publication had been duly complied with. "As to the condition now under consideration," observes Danforth, J., in this case, "it is well settled that the necessary publication may be discovered by circumstances as well as words, and inferred from the conduct and acts of the testator, and that of the attesting witnesses in his presence, as well as established by their direct and positive evidence. Even a person both deaf and dumb may, by writing or signs, make his will and declare it." *Ib.* The New York cases are very numerous which construe this "declaration" phrase of the statute. See *Coffin v. Coffin*, 23 N. Y. 1; *Lewis v. Lewis*, 11 N. Y. 220; *Gilbert v. Knox*, 52 N. Y. 125; *Thompson v. Stevens*, 62 N. Y. 634; numerous cases cited in 95 N. Y. 499. *Cf. Mitchell v. Mitchell*, 77 N. Y. 596, where there was not considered a sufficient attestation. See 3 Redf. (N. Y.) 181; 4 Redf. 244; 1 Demarest, 496. Where a testator is asked if the

instrument is his will, and answers in the affirmative, this is a sufficient declaration. *Reeve v. Crosby*, 3 Redf. 74; *Coffin v. Coffin*, 23 N. Y. 15. See 49 N. Y. Supr. 434; 52 N. Y. Supr. 1; 51 N. Y. Supr. 571; *Voorhis Re*, 125 N. Y. 765.

The declaration or publication in question by the testator need not be made at the very act of signing; it is sufficient if made on the same occasion, and as part of the same transaction. *Collins Re*, 5 Redf. 20. It may be made to the attesting witnesses separately. 2 Demarest, 309. Whether signing or acknowledgment shall precede the declaration, or *vice versa*, is of no practical consequence, so long as they are essentially contemporaneous. *Jackson v. Jackson*, 39 N. Y. 162. But in order to satisfy the statute, the declaration before the attesting witnesses must be unequivocal, whether expressed by words or signs. It will not suffice that the witnesses have learned elsewhere, and from other sources, that the document is a will, or that they suspect such is the character of the paper. The fact must, in some manner, although no particular form of words is required, be declared by the testator in their presence, so that they may know it from him. *Allen, J.*, in *Lewis v. Lewis*, 11 N. Y. 226.

In New York a substantial compliance with the statutory method of publication is more readily inferred where the will is holographic (or in the testator's own handwriting) than where some one else wrote it. *Beckett Re*, 103 N. Y. 167. But an exhibition of the will, with the testator's signature appended, appears always indispensable to fulfil the statute. 49 N. Y. Supr. 434; 51 N. Y. Supr. 571. "The formalities prescribed by the statute are safeguards thrown around the testator to prevent fraud and imposition. To this end the witnesses should either see the testator subscribe his

assume that a substantial rather than a literal compliance with the statute formalities is sufficient.

In this respect the enactments we have just mentioned differ materially from the English statute of 1 Vict. c. 26; for that statute dispenses with publication of the will by the testator, as a distinct act in the presence of the attesting witnesses.¹ Nor under the statute of Car. II., which required the testator to sign, was publication concluded an essential, by the later cases, though Lord Hardwicke had in earlier times strenuously insisted to the contrary.² Indeed, the long established doctrine, both of England and the United States, is, as we have elsewhere intimated, that, independently of an express statute requiring publication, a will may be duly executed by a testator without any formal announcement of a testamentary purpose on his part, and without a word uttered by him to show what is the nature of the instrument which witnesses are called upon to subscribe.³ On the contrary, the maker's signature *animo testandi*, and his proper acknowledgment, such as we have described, showing that he has put his name *bona fide* upon the paper which he desires witnessed, where he has not signed in their presence, renders the execution valid in general without any other or more formal publication; and the signatures of the witnesses being duly affixed, the act of execution becomes complete.

Publication is the act of declaring the instrument to be the last will of the testator;⁴ and the words "publish" or "de-

name, or he should, the signature being visible to him and to them, acknowledge it to be his signature." Earl, J., in *Mackay's Will*, 110 N. Y. 611, 615.

¹ See § 13 of this act; appendix.

² *Moodie v. Reid*, 7 Taunt. 361, *contra* *Ross v. Ewer*, 3 Atk. 156; *Doe v. Burdett*, 4 Ad. & El. 14; 9 Ad. & El. 936. Lord Hardwicke, in *Ross v. Ewer*, contended for the publication of a devise of real estate. Publication of a will of personalty was never necessary.

³ 1 Jarm. Wills, 80, 81; 1 Wms. Exrs. 84; *White v. British Museum*, 6 Bing. 310; *Osborn v. Cook*, 11 Cush. 532,

per Thomas, J.; *Dean v. Dean*, 27 Vt. 746; *Cilley v. Cilley*, 34 Me. 162; *Smith v. Dolby*, 4 Harring. 350; *Watson v. Pipes*, 32 Miss. 421; 12 Gratt. 239; *Meurer's Will*, 44 Wis. 392; *Cheatham v. Hatcher*, 30 Gratt. 56; *Hulse's Will*, 52 Iowa, 662.

⁴ See Bouv. Dict. "Publication." The word "declare" in the New York code signifies "to make known, to assert to others, to show forth," and this in any manner, either by words or by acts, in writing or by signs; and to declare to a witness that the instrument described was the testator's will, means

clare " may conveniently be distinguished from the "acknowledging" of which we have spoken, a term quite commonly employed in wills acts with the lesser and limited application. But a well-drawn attestation clause usually begins, "Signed, sealed, published, and declared," etc. ; and it is undoubtedly prudent and natural, even if unnecessary, for the testator to make formal publication before the witnesses at the time they attest. And if the signatures and the whole execution be properly managed, there is no reason why a scrivener or lawyer present who represents the testator should not formally announce on the latter's behalf that the wish is his will, while the testator remains silent.¹

§ 327. **Simultaneous Presence of Witnesses.** — Again, the making or acknowledgment of the testator's signature is in England, under the Statute of Victoria, required to be in the simultaneous presence of the witnesses,² whereas the old Statute of Frauds permitted the testator either to sign before one or two witnesses and acknowledge the will before the others, or to acknowledge the will before all the witnesses separately without signing in the presence of any of them.³ American codes will, on inspection, be found to vary on this point.

But the Statute of Victoria proceeds to state simply that these witnesses "shall attest and shall subscribe the will in the presence of the testator"; and while the natural consequence would be, that their attestation, following his making or acknowledging his signature in their simultaneous presence, would be in the presence of each other as well, this, it is held, is not an indispensable condition. In other words, they must attest in the presence of the testator, but not nec-

to make it at the same time distinctly known to him by some assertion, or by clear assent in words or signs. 26 Wend. 325, approved in *Lane v. Lane*, 95 N. Y. 498.

¹ *Denny v. Pinney*, 60 Vt. 524; *Mundy v. Mundy*, 2 McCart. 290.

² 1 Jarm. Wills, 108; *Smith v. Smith*, L. R. 1 P. & D. 143; *Moore v. King*, 3

Curt. 243. "Such signatures shall be made or acknowledged by the testator *in the presence of two or more witnesses present at the same time.*" Stat. 1 Vict. c. 26, § 9.

³ *Smith v. Codron*, 2 Ves. 455; *Wright v. Wright*, 7 Bing. 457; 3 P. Wms. 253; *Addy v. Grix*, 8 Ves. 504; *Ellis v. Smith*, 1 Ves. Jr. 11; 1 Jarm. Wills, 81.

essarily of each other.¹ Many American enactments adopt the same view.² Under several of her codes, however, the legislative impression imports that the witnesses must subscribe their names in presence of each other;³ and this is altogether the preferable course to pursue in practice, under any circumstances, in order to make the proof for establishing the will as clear as possible.

§ 328. Subscription by Testator after the Witnesses; Acknowledgment by Witness not Acceptable.—In New York a subscription of the will by the testator after one or both of the witnesses have signed their names to it is not a due execution.⁴ Such, too, is the English rule on the subject under the Statute of Victoria;⁵ this enactment intending that the testator shall make or acknowledge his signature (not his will) before either of the witnesses signs, and, of course, while both are present. There are a few American States where a different rule of local construction appears to have been adopted; but on the whole the preponderance of American authority discountenances the prior subscription of witnesses to a will.⁶

The theory here favored is, that while the statute leaves the testator free either to sign out of their presence and acknowledge before the witnesses or to sign in their presence at his discretion, they, on their part, have no option but to attest and subscribe in his presence, and they cannot acknowl-

¹ 3 Curt. 659; Webb, Goods of, Dea. & Sw. 1; 1 Wms. Exrs. 90. But cf. Caseant v. Fulton, 5 Moore P. C. 130.

² This is the rule of New York. Willis v. Moot, 36 N. Y. 486; Bogart *Re*, 67 How. Pr. 313. And of New Hampshire. Welch v. Adams, 63 N. H. 344. And of Arkansas. Rogers v. Diamond, 13 Ark. 474. And of Massachusetts. Ela v. Edwards, 16 Gray, 91; Chase v. Kittredge, 11 Allen, 49. And of Georgia. Webb v. Fleming, 30 Ga. 808. And of Illinois. Flinn v. Owen, 58 Ill. 111. And of Indiana. Johnson v. Johnson, 106 Ind. 475. And see Grubbs v. Marshall, Am. Dig. (Ky.) 1890.

³ See Vermont rule as stated in Roberts v. Welch, 46 Vt. 164; 42 Vt. 658.

It was formerly thus in Connecticut. Lane's Appeal, 57 Conn. 182.

⁴ Jackson v. Jackson, 39 N. Y. 153; 21 Hun, 383; 6 Dem. 347.

⁵ 2 Curt. 865; 3 Curt. 117, 648; Moore v. King, 3 Curt. 243; Charlton v. Hindmarsh, 1 Sw. & Tr. 433; 8 H. L. Cas. 160; 1 Wms. Exrs. 90. The words of the act are prospective, that such witnesses "*shall* attest and *shall* subscribe," etc.

⁶ See this subject exhaustively examined by Gray, J., in Chase v. Kittredge, 11 Allen, 49, with English and American citations; Reed v. Watson, 27 Ind. 443; Duffie v. Corridon, 40 Geo. 122. But as to presumptions, see § 322.

edge a signature before him in return. Hence, it is held under the English statute that where one of the two witnesses subscribes his name to the will before the testator has made or acknowledged his own signature in presence of both, and the other witness then subscribes alone, it is not a legal compliance that the first witness should afterwards acknowledge his premature signature; but either he must re-subscribe, or the will fails of its essential subscription and attestation.¹ This position is reinforced in New York practice, by the consideration that under the peculiar legislation of that State,² attesting witnesses are, by this act of signing their names, to attest, not only the testator's signing or acknowledgment, but his contemporaneous declaration that it is his will.³

On the whole, it does not seem to affect the legal objection that a local statute follows the language of the old Statute of Frauds rather than that of Victoria, in prescribing the formalities of attestation.⁴ And what we should here particularly observe is that witnesses are required under both of these enactments, not only to attest the will, but to subscribe it "in presence of" the testator; for which reason a subscrip-

¹ *Moore v. King*, 3 Curt. 243. To pass over a signature previously made, with a dry pen, amounts to no more than an acknowledgment, and does not serve as a re-subscription. *Playne v. Scriven*, 1 Rob. Eccl. 775. Nor is it an attestation and subscription for a witness to add his residence after his name already subscribed on a previous day. *Trevanion Re*, 2 Rob. 311. And see 2 Curt. 865; 3 Curt. 659; *Hindmarsh v. Charlton*, 8 H. L. Cas. 160.

² *Supra*, § 326.

³ *Jackson v. Jackson*, 39 N. Y. 153, 161. Woodruff, J., here comments with much force upon the danger which would arise if the testator could keep a will in his possession signed by others and then add his signature. "The statute," he further observes, "contemplates acts, each of which are serious and important. Execution and the attestation thereof bear a plain relation

to each other in point of time, in the good sense and common apprehension of every one, and the statute prescribing the requisite formalities to a valid execution and authentication, plainly contemplates that the acts of the witnesses shall attest the signing and declaration of the testator as a fact accomplished."

⁴ See *Chase v. Kittredge*, 11 Allen, 63. "The [Massachusetts] statute requires that the will shall 'be in writing and signed by the testator,' and shall be 'attested and subscribed, in the presence of the testator, by three or more competent witnesses.' He is not required to write his signature in their presence, but it is his will which they are to attest and subscribe. It must be his will in writing, though he need not declare it to be such. It must therefore be signed by him before it can be attested by the witnesses." *Per Gray, J.*, *ib.*

tion of his name prematurely by a witness, while the testator is absent, is especially obnoxious to the requirement, and cannot be cured by an acknowledgment afterwards in the testator's presence without a re-subscription.¹

But if, on the other hand, the subsequent acknowledgment of a signature placed upon the will out of the testator's presence is not relied upon, nor a signing out of his presence at all, but the signing of witnesses and testator was, in fact, contemporaneous and fulfilled the statute in all other respects, our courts do not so readily condemn the will because the true sequence of signing happens casually to be reversed; some witness taking up the pen out of turn and before the testator. For here, it may be said, there is but a trivial variation of formal facts in one complete and consistent transaction; and the policy whose aim it is to prevent the possibility of fraud in procuring the names of witnesses can suffer no infringement.² Moreover, it is fair to presume, in absence

¹ This was the precise point settled in *Chase v. Kittredge*, *supra*. And see cases cited, *ib.* The Act 29 Car. II. did not permit a witness to acknowledge a signature made in the testator's absence as equivalent to a subscription in his presence. 3 Mod. 219; 2 P. Wms. 510; 3 P. Wms. 254.

Acknowledgment by a witness is not deemed a sufficient substitute for a subscription in the testator's presence under the Vermont code, *Pope v. Pope*, cited 11 Allen, 61. Nor in New Jersey. *Den v. Milton*, 7 Halst. 70; *Combs v. Jolly*, 2 Green Ch. 625. Nor apparently in Delaware. *Rash v. Purnel*, 2 Harring. 458; *ib.* 506. Nor in North Carolina. *Ragland v. Huntingdon*, 1 Ired. 561; 10 Ired. 561. And in Indiana the same rule is followed. *Reed v. Watson*, 27 Ind. 443. Also in Georgia. *Duffie v. Corridon*, 40 Geo. 122. Also in Rhode Island. *Pawtucket v. Ballou*, 15 R. I. 58. *Contra*, *Sturdivant v. Birchett*, 10 Gratt. 67; 11 Gratt. 220. These Virginia decisions appear to be the only ones in which an acknowledgment by a witness to a will in the testator's pres-

ence, of a signature affixed in his absence, has been held equivalent to an attestation and subscription in his presence. Whether *Moale v. Moale*, 59 Md. 510, 519, is decided according to rule on this point, *qu.*; for the published report does not clearly state the facts on which the opinion is based.

² *Miller v. McNeill*, 35 Penn. St. 217, is in point; the court declining to be bound by English precedents if they are less favorable. And see *O'Brien v. Gallagher*, 25 Conn. 229; 1 B. Mon. 117, approved in *Upchurch v. Upchurch*, 16 B. Mon. 113; *Vaughan v. Burford*, 3 Bradf. 78. Other cases seek this result by discrediting the evidence of witnesses themselves on this point. 21 Hun, 383.

Some American statutes are not so expressed as to require a signing "in the testator's presence." See 11 Allen, 61, and citations. The Pennsylvania statute, too, is a peculiar one, as we have seen, not requiring subscription in the testator's presence, nor even subscription at all. *Supra*, § 256; 11 Allen, 62.

of clear proof to the contrary, that the testator signed first and his witnesses afterwards, as they should and would naturally have done.¹

§ 329. **Request to Witnesses to sign.** — The request that witnesses should attest and subscribe one's will may be inferred from acts and conduct of the testator as well as his express words; the law regarding substance rather than literal form in such matters. It is not essential, therefore, that the testator should expressly ask the subscribing witness to attest his will.² His acts, his gestures, may signify this request; whatever, in fact, implies his knowledge and free assent thereto.³ Indeed, the active part in procuring the witnesses and requesting them to attest and subscribe is not unfrequently borne by some friend, near relative or professional counsel; and if such third person acts truly for the testator in his conscious presence and with his apparent consent, the legal effect is the same as though the testator himself had spoken and directed the business.⁴ But under such circumstances the tacit or open conduct of the testator himself, as expressive of his knowledge and free assent or the reverse, demands the strictest scrutiny; for nothing done by others officiating on his behalf in a clandestine, fraudulent or overpowering way, can stand as the testator's own act though done in his presence.⁵

"The general and regular course undoubtedly is, for the testator in the first place to sign and execute the will on his part, and then call upon the witnesses to attest the execution by subscribing their names." *O'Brien v. Gallagher*, 25 Conn. 229.

¹ *Allen v. Griffin*, 69 Wis. 529; § 347.

² *Coffin v. Coffin*, 23 N. Y. 9; 2 Bradf. 295; *Higgins v. Carlton*, 28 Md. 117; *Rogers v. Diamond*, 13 Ark. 474; *Myrick Prob.* 50; *Allen's Will*, 25 Minn. 39.

³ *Allison v. Allison*, 46 Ill. 61; *Hutchins v. Cochrane*, 2 Bradf. 295; *Davies, Goods of*, 2 Robert. 337.

⁴ *Inglasant v. Inglasant*, L. R. 3 P. &

D. 172; *Gilbert v. Knox*, 52 N. Y. 125; *Peck v. Cary*, 27 N. Y. 9; *Bundy v. McKnight*, 48 Ind. 502; *Cheatham v. Hatcher*, 30 Gratt. 56; *Meurer's Will*, 44 Wis. 392; 87 Ind. 13.

⁵ See *Heath v. Cole*, 15 Hun, 100. Our chapter, *supra*, on fraud and undue influence, shows various instances where the officious zeal of interested parties in procuring a formal execution of the will has aided much in condemning it. Every prudent attorney who is called upon to take an active part in procuring the execution of a will, takes heed to elicit as far as possible, before the witnesses, the active interest and participation of the testator himself.

§ 330. **Attestation and Subscription distinguished.** — Statutes which relate to the duty of subscribing wills couple usually the words “attest” and “subscribe”; and these words should be distinguished. “To attest the publication of a paper as a last will,” observed Robertson, C. J., of Kentucky, in 1840, “and to subscribe to that paper the names of the witnesses, are very different things, and are required for obviously distinct and different ends. Attestation is the act of the senses; subscription is the act of the hand; the one is mental, the other mechanical; and to attest a will is to know that it was published as such, and to certify the facts required to constitute an actual and legal publication; but to subscribe a paper published as a will, is only to write on the same paper the names of the witnesses, for the sole purpose of identification. There may be a perfect attestation, in fact, without subscription.”¹ We have seen that a legal publication is now usually dispensed with, except that the testator must either sign in presence of the subscribing witnesses or make due acknowledgment instead; but in knowing and certifying whatever is thus made requisite consists still in the attestation by the witness as distinguished from the manual act of putting his name to the paper. By attestation we signify the act of witnessing in its full legal import; by subscription, the signing of one’s name, which implies that this act has been performed.

§ 331. **What is Signing or Subscription, by the Witness.** — Now, to consider more particularly the attestation and subscription of the will by the witness. And first we inquire

A statute requirement, as in New York, that witnesses shall sign at the testator’s “request,” receives a liberal interpretation. See *Coffin v. Coffin*, 23 N. Y. 9; 5 Redf. (N. Y.) 431; *Brown v. Clark*, 77 N. Y. 369.

¹ *Swift v. Wiley*, 1 B. Mon. 114, 117. And see *Gerrish v. Nason*, 22 Me. 441; *Reed v. Watson*, 27 Ind. 448.

That a formal attestation clause is unnecessary (see § 346, *post*) is not inconsistent with the provision of an act that

the witnesses shall “attest” as well as subscribe the will; for the word “attest” means merely to act as a witness, which might in fact be done without a subscription; although in construing such acts, we may suppose that no attestation will satisfy the legal requirement, except through the outward mark of subscription. 1 Jarm. Wills, 109, 110; Sir C. Creswell in *Charlton v. Hindmarsh*, 1 Sw. & Tr. 439.

what signing or subscription on his part will satisfy the statute. The precedents adduced as to the testator's proper mode of signing may be interchanged considerably with those under the present head.¹ For a subscribing witness, like the testator himself, signs most appropriately by writing out his name boldly with pen and ink whenever he can do so, and yet does not sign thus invariably.

There is much more reason why a testator who knows how to write should yet be found incapable of doing so unassisted at the execution of the will, than any of his subscribing witnesses, and hence be permitted to make his mark, use a stamp, sign by initials, or suffer his hand to be guided over the paper, with the full force and effect of a regular signature *animo testandi*. Witnesses, being chosen from society at large, whereas the testator himself is frequently sick and in apprehension of death when his will is executed, are best chosen from the intelligent and able-bodied. Nevertheless, a witness may lawfully subscribe a will by mark² or by initials,³ and probably by a stamp or device, especially if illiteracy or some other consistent reason may be given for it. But placing his seal to the paper is not signing, any more than in the signature of the testator.⁴ If the witness cannot write without assistance, his hand may be guided over the paper by another.⁵ Initials, a signature with a guided hand, or a cross-mark around which some one else writes the name of the witness before or afterwards, — all these are modes of signing by the party himself, and not by another.⁶ It is only needful that the witness should have intended to denote on his part the full and deliberate act of a legal attestation and to have performed by his own hand a subscription accordingly.⁷

¹ *Supra*, §§ 303-305.

² *Harrison v. Harrison*, 8 Ves. 185; 2 Rob. 116; *Ashmore, Goods of*, 3 Curt. 756; *Pridgen v. Pridgen*, 13 Ired. 259; *Ford v. Ford*, 6 Humph. 92; *Thompson v. Davitte*, 59 Ga. 472; *Osborn v. Cook*, 11 Cush. 532; *Lord v. Lord*, 58 N. H. 7.

³ 2 Rob. 110; 1 Redf. Wills, 229; 1

Jarm. Wills, 82. But see 1 Hill Ch. 265.

⁴ 3 Curt. 117.

⁵ 3 Q. B. 117; *Frith Re*, 4 Jur. N. S. 288.

⁶ *Supra*, § 309.

⁷ Even though a statute should declare that each witness shall subscribe "his name," signing by mark, etc., is

§ 332. **The Same Subject.**—The identification of himself as the person actually attesting is implied in the signature of a witness, whatever shape that signature may take. Hence, the use of a fictitious name, or the misspelling, variation or contraction of one's own name, or even a signature which describes instead of naming at all, may answer the purpose of the statute, provided the genuine intention of subscribing as a witness accompanied the act.¹ Nor is a marksman's signature avoided by the circumstance that a wrong surname is written against it.²

§ 333. **Signing or Subscription Insufficient where a Complete Intent to Subscribe was Wanting, etc.**—But where the signing or subscription by initials, by mark, or by whatever else falls short of a full signature, was accompanied by an incomplete intention of subscribing as a witness, the statute is not satisfied. As in the case where one of the witnesses, through feebleness, finds himself unable to complete his signature after writing his Christian name, and a substitute is called in.³

Nor, again, is the statute satisfied where the signature relied upon, whether imperfect or in full, was placed upon the paper without the corresponding *bona fide* intention of

not excluded by intendment. 10 Paige, 85.

But the mark of the witness must be duly proved. *Thompson v. Davitte*, 59 Ga. 472; 1 Harr. & J. 399. And it is certainly unadvisable to have witnesses who sign by mark, device, etc., where a testator can possibly avoid it, for it invites litigation. An extreme instance of valid signature by mark is afforded by *Ashmore, Goods of*, 3 Curt. 756. Here a testatrix wrote out her own codicil, and produced it with her signature to two of her maidservants, both of whom were illiterate. At her request they made their respective marks, and the testatrix then wrote their names opposite; but by mistake she gave to one of them a wrong surname. This attestation was sustained by Sir H. J. Fust, and probate of the will granted.

¹ See 2 Spinks, 57; 29 L. J. Prob.

114. In *Sperling's Goods*, 3 Sw. & Tr. 272, a servant to the testator, who was called in as one of the witnesses, wrote instead of his name, "Servant to A," misunderstanding the direction given to him; and in the haste of execution this informality was not noticed. Sir J. P. Wilde, upon proof that the servant meant this as a proper subscription and attestation on his part, treated the description as equivalent to the name, and admitted the will to probate.

² *Ashmore, Goods of*, 3 Curt. 756.

³ *Maddock, Goods of*, L. R. 3 P. & D. 169. Here, the Statute of Victoria requiring "simultaneous presence," etc., the second attempt at a legal execution failed from other causes; while the first attempt was held insufficient because the feeble witness had desisted from completing his attestation. See also *Myrick Prob.* 124.

subscribing as an attesting witness. As, for instance, if one should put a wrong name to the paper with the intention of making it appear that the person bearing that name, instead of the witness himself, signed it.¹ Or where initials were placed on the will, not with the subscribing purpose, but merely to note alterations.² Or generally in case of a signature, fraudulently or surreptitiously procured, and affixed, in fact, without the intention of subscribing as a witness at all on the particular occasion.³

§ 334. **Subscription must be *Animo Attestandi*; noting Interlineations, etc.** — In short, the subscription by a witness, in order to be good, must have been made freely and understandingly, *animo attestandi*. One who writes his name with a different intent or under some constraint which deprives him of his free agency cannot be regarded, in the legal sense, as a subscribing witness at all.⁴ But it does not necessarily follow that a person who signs the paper with another purpose in view may not have intended his signature to serve for attestation as well.⁵

As a safeguard against fraud or error, erasures or interlineations made in the instrument before signing are properly noted in the attestation by the witnesses, especially if important ones; yet the fact that such erasures or interlineations are not noted at the foot of the instrument does not invalidate the probate.⁶

¹ *Pryor v. Pryor*, 29 L. J. Prob. 114.

² 29 L. J. Ch. 71; 1 Rob. 712; 1 Jarm. Wills, 82. See 80 Va. 293, cited p. 335.

³ See *Hindmarsh v. Charlton*, 8 H. L. Cas. 160, and other cases cited § 345, *post*, where acts not intended as a re-subscription by the witness are denied that effect.

⁴ *Wilson*, Goods of, L. R. 1 P. & D. 269; *Dunn v. Dunn*, L. R. 1 P. & D. 277.

⁵ *Griffiths v. Griffiths*, L. R. 2 P. & D. 300, where one witness signed "A. B., Executor," as signifying, further, his consent to serve in that capacity, as the

testator had requested. See also *Payne v. Payne* (Ark.) 1891.

Where another name is written among those of the subscribing witnesses, it may be shown by extrinsic proof to have been written there without any intention of attesting; and upon such proof it may be omitted from the probate. *Sharman Re*, L. R. 1 P. & D. 661.

Two testamentary instruments were prepared and signed by a testator, all on one sheet. Only the first appeared to have been attested; and it was held that the attestation to the first could not be construed to cover the second. 2 Robert. 411.

⁶ 6 Dem. 162.

§ 335. **Position of the Signature.**— So long as the witness has subscribed with suitable intent, the general law insists upon no particular place of subscription: though the usual and proper place is below an attestation clause, if there be one, otherwise at the left of the testator's signature, as in deeds and other attested documents. But in determining whether persons have subscribed a will, actually and intentionally as attesting witnesses, the position of their signatures may prove most material in a controversy.¹ If the names are written directly under an attestation clause, no difficulty arises; but when they are placed on some strange and unusual part of the paper, the probate of the will is in great peril. Thus, it has been considered that if names are placed under a particular clause or statement, the inference seems to be *prima facie* that they were put there to give effect or to testify to the words of that clause or statement and not for attesting the whole instrument.² But proof that a full attestation was thereby intended will rebut such a presumption.³

When the will contains no regular attestation clause, it is customary and proper to use some such expression as "witness," "attest," "in the presence of," or "signed and acknowledged before," by way of briefly attesting and showing why the names are placed there. These expressions, though convenient certainly, are not indispensable; for witnesses subscribe sufficiently, whenever they see the will executed by the testator, and proceed at once to sign their names on any part of it, with the intention of attesting it, and this whether explanatory words are placed on the paper or not.⁴ They

¹ The statute 1 Vict. c. 26 prescribes where the testator shall sign, but is silent as to the witnesses.

² Thus, in *Wilson, Goods of*, L. R. 1 P. & D. 269, a will was written on one page of a foolscap sheet, and the testator's name was signed at the bottom, with "Witness A. B." at the left. The second page contained a brief inventory of property, under which were three other signatures, "C. D.," "E. F.," and

"G. H." Most of these parties were dead by the time of probate, and no testimony could be had to explain the circumstances of execution. The court concluded that the last three names, from their position, were not placed upon the paper *animo attestandi*, and refused a probate, since one witness, "A. B.," could not give the will validity.

³ *Streatley, Goods of*, P. (1891) 172.

⁴ *Roberts v. Phillips*, 4 E. & B. 450.

need not sign near the testator, nor even near one another.¹ This rule is liable, however, to statute variance;² and as the foot of the will and the vicinity of the testator's own signature supply the natural situation for these body-guards of an instrument which may need strong defence, there the witnesses' names are safest found. Any part of the will which follows such signatures must be shown to have been written before they signed;³ and misconstruction of the motives under which they signed out of due place is the more possible when their own direct testimony is equally out of reach with that of the testator.

§ 336. **The Same Subject: Attestation on a Different Paper.** — But the attestation or subscription by witnesses must be on the same sheet of paper as that which contains the testator's own signature, or else upon some paper physically connected with that sheet. No particular mode of connection is prescribed by law; and hence the fastening by tape, by eyelets, by mucilage, or even by a pin, seems unobjectionable. Where papers are thus connected, the testator may

¹ *Ib.* Here witnesses signed not only on a different side of the sheet from the testator, but so as to leave a considerable blank between their names and his, and yet the attestation was upheld. See also *Braddock, Goods of*, 1 P. & D. 433; *Collins Re*, 5 Redf. 20. Witnesses may sign above instead of below the words designating attestation, without invalidating the will. *Moale v. Cutting*, 59 Md. 510. And a will is well executed where a person signed in presence of two witnesses, his wife adding her assent thereto, though one of the witnesses, intending to attest the will, signed his name below the wife's expression of assent. *Potts v. Felton*, 70 Ind. 166. And see *Murray v. Murray*, 39 Miss. 214. In Texas it is held of no importance that witnesses sign in and not after the attestation clause. *Franks v. Chapman*, 64 Tex. 159.

It matters not, under the Statute of Victoria, in what part of the will the attesting witnesses write their names,

provided it appear that the signatures were meant to attest the requisite signature of the testator. 3 Curt. 748; 1 Robert. 757; 1 Wms. Exrs. 96; *Roberts v. Phillips*, *supra*. By this we are to understand that this intention appears upon all the proof. For, if no other evidence can be produced at probate except the instrument, and the natural import of its face raises a different view as to what the names meant as they stood, a careless subscription in this respect may prove fatal to the will.

² In Kentucky, contrary to the usual rule, attestation must be made at the end of the will; and any unreasonable gap between the testator's signature and that of the witnesses may vitiate the will. *Soward v. Soward*, 1 Duv. 126. The New York statute is imperative that attesting witnesses shall sign at the end of the will. 4 Dem. 124; 1 Dem. 256; 54 N. Y. Supr. 127; *Conway's Will*, 124 N. Y. 455.

³ 1 No. Cas. 396; 1 Jarm. Wills, 84.

sign on one paper and the witnesses on another, provided their intent corresponded.¹

But attestation or a subscription by witnesses on a piece of paper, detached and separated from the will and the testator's signature, nor affixed in his presence to the paper at the time of execution, fails of compliance with the policy of our law: we may assume it to be void, as otherwise a door must be open to much fraud and perjury.

§ 337. **The Same Subject: Attestation where a Will is written on Several Sheets.**—Most acts (including the English statute of Victoria) are silent concerning the attestation of wills which are written on several sheets. And the rule which consequently applies is that established under the Statute of Frauds: namely, that if the will be written on several sheets, whether fastened together or not, and the last sheet alone is attested in form, the whole will is well executed, provided all the sheets were in the room.² The Statute of Frauds did not require that all the sheets should have been seen by the witnesses;³ but under the policy of some later codes a more positive exhibition of the whole will in their presence may be insisted upon; and unquestionably, if the several pieces of paper are connected in their provisions and form a connected series, and are brought in this shape before the attesting witnesses at the time of their subscription, a single attestation will suffice for the whole.⁴

It is simply the later interpolation of sheets not actually attested by them, or a subtraction, which the law still guards against under these circumstances;⁵ for execution, whether by testator or witnesses, should receive its intended scope

¹ In *Braddock, Goods of*, 1 P. D. 433, a codicil was pinned to the original will. The testator signed the codicil, and the witnesses subscribed on the back of the will. This, being done *animo attestandi*, was held a good subscription. And see *Collins Re*, 5 Redf. 20, where the attestation clause was pasted at the end of the will.

² *Bond v. Seawell*, 3 Burr. 1773;

Marsh v. Marsh, 1 Sw. & Tr. 528; *Rees v. Rees*, L. R. 3 P. & D. 84; *Ela v. Edwards*, 16 Gray, 91; *Tonnele v. Hall*, 4 Comst. 140; *Wikoff's Appeal*, 15 Penn. St. 281; *Gass v. Gass*, 3 Humph. 278.

³ *Ib.*; 1 Wms. Exrs. 97.

⁴ *Ela v. Edwards*, 16 Gray, 91.

⁵ *Ewen v. Franklin, Dea. & Sw.* 7;

Rees v. Rees, L. R. 3 P. & D. 84.

and no more. From this point of view, it is decidedly preferable that the sheets should be fastened together before execution at all, so that the integrity of the will may go undisputed; and yet this fastening of parts may follow the attestation, without invalidating the disposition.¹ It is a question of fact in any case, whether, under all the circumstances, the sheets as presented for probate constituted the identical will as actually and intentionally executed; and presumptions favor the will in its integrity as found at the testator's death.² But if sheets were then found scattered about, instead of together; or if they failed to correspond in sense, as constituting one distinct instrument; or if the witnesses subscribed earlier sheets, but not the last; in all such cases, the circumstances would bear unfavorably.³

§ 338. "Signing" and "Subscribing" Equivalent Terms; Differences as between Testator and Witnesses. — There seems to be no vital distinction between the words "signing" and "subscribing," as used by legislatures in the present connection. When witnesses are required to perform the manual act of subscribing, they are called upon simply to make a valid signature in the same sense which applies to the testator, and not, as a literal construction might import, to "write under" him.⁴

But, as already observed, legislation permits a testator to "make his signature" or "acknowledge" before the witnesses at his option, while directing witnesses to "subscribe" in return, without any such option.⁵ And there remains still another distinction to observe, namely, that the testator may sign the will, either personally or "by some other person in his presence, and by his direction"; while witnesses are directed to sign without any such explicit admission of a substitute.⁶ This latter point of difference, let us now consider.

¹ Jones v. Habersham, 63 Ga. 146.

³ Curt. 243; Roberts v. Phillips, 4 E. &

² 1 Wms. Exrs. 97; Rees v. Rees, L.

B. 450; 1 Wms. Exrs. 96.

R. 3 P. & D. 87; cases *supra*.

⁵ *Supra*, §§ 321-325.

³ 1 Jarm. Wills, 84; 14 P. D. 49; 6 Dem. 262.

⁶ See 1 Vict. c. 26, § 9; also the language of the various American codes on this subject. Under the older Statute

⁴ 1 Jarm. Wills, 82; Moore v. King,

§ 339. **Whether another may sign for the Subscribing Witness.**—By English construction of the Statute of Frauds, the witness must himself sign or subscribe *animo attestandi*, and the signature cannot be made by some other person for him.¹ And the rule is the same under the present statute of Victoria. It follows that one witness cannot subscribe for another.² But we are still to remember that one's signature by a mark or with a guided hand, is his own signature; and one witness may in this manner help out another witness, besides signing his own name.³

In the United States this rule is not uniformly stated, and, in fact, the question is seldom raised. But the doctrine, as generally expounded, denies, like that of the English cases, that a witness to a will signs or subscribes so as to satisfy the statute without some manual act on his part by way of attestation.⁴ This theory is fortified by the recognized distinction that a witness cannot make acknowledgment of his signature as a testator may;⁵ and by the further omission of that statute option of signing by another which the local code, like that of England, expressly confers upon a testator. But there are States in which a different view is taken, namely, that the name of an attesting witness (especially if unable to write) may be written by another, at his request, in his presence and in the presence of the testator;⁶ nor matters it that this other person is himself one of the subscribing witnesses.⁷

of Frauds, which so many of our codes follow, a similar difference of expression is found.

¹ 3 Curt. 243; 7 Jur. 205, 1045; 1 Jarm. Wills, 82. In *Leverington's Goods*, 11 P. D. 80, a wife's signature of the name of her husband, who was unable to write, was held an improper attestation.

² 2 Notes Cas. 461; 1 Wms. Exrs. 95.

³ *Harrison v. Elvin*, 3 Q. B. 117; 1 Sw. & Tr. 153; *Lewis v. Lewis*, 2 Sw. & Tr. 153.

⁴ *Le Roy, Ex parte*, 3 Bradf. 227; 2 Bradf. 96, 392; *Riley v. Riley*, 36 Ala.

496; *Horton v. Johnson*, 18 Geo. 396. But one witness may guide the hand of another, or write a name about his mark, etc., as under the English rule, consistently with treating the latter as signing for himself. 2 Bradf. 96, 392.

⁵ *Supra*, § 338.

⁶ *Upchurch v. Upchurch*, 16 B. Mon. 102; *Jesse v. Parker*, 6 Gratt. 57.

⁷ *Ib.* In *Lord v. Lord*, 58 N. H. 7, this view is adopted, but, as the writer thinks, injudiciously. It is true that the statute, in requiring an attestation of a will, aims to insure identity and prevent the fraudulent substitution of another

Whenever a subscribing witness can sign for himself, being neither illiterate nor physically disabled, it seems the more objectionable that another should sign for him;¹ and for the fellow-witness to affix such signature under any circumstances we deem a more impolitic course than for some other party to do so who might himself have served in place of the one whose name he wrote.²

§ 340. **Subscribing "in Presence of" the Testator, etc.; English Rule.**—Now as to signing or subscribing a will "in presence of" the testator. For in this provision our codes well harmonize, though seldom positive in declaring that witnesses shall sign in presence of one another. The English decisions as to what shall be considered "the presence" of the testator at the subscription are numerous, stretching over

document, besides surrounding the testator with witnesses to judge of his capacity. Under the New Hampshire law, moreover, there are three witnesses to a will, so that, one signing for another, two are left, as in England and many of our States. But were a legislature to require seven witnesses to attest and subscribe a will, the court ought not by construction to reduce the number by a single person; and this we think is really done whenever one subscribing witness is permitted to sign the name of another, without any physical participation by the latter in the act of attestation. The court in *Lord v. Lord* argues this point upon the general principle of agency: *qui facit per alium, facit per se*. "To require a person," says Foster, J., "whose name is to be written in a testamentary transaction, to hold or to touch the pen, or to do anything which the law does not require him to do in other cases of attestation, seems to establish a distinction without a difference." Our response to this is, that attestation is and ought to be more closely guarded in testamentary transactions than in any other; and the whole scope of our modern legislation indicates a public conviction and pur-

pose accordingly. And we think it better for one's will to fail occasionally, because of a heedless sort of attestation, than to encourage questions of doubtful agency in the signing by one witness of other persons' names to be raised at the probate. It is always easy to secure two or three competent persons to subscribe a will in these days, so that each shall at least make his mark and act in a legal sense for himself. And the cardinal principle in preparing all wills should be, to have the document appear *bona fide* and regular on its face when produced after the testator's death.

¹ *Riley v. Riley*, 36 Ala. 496; *contra*, *Jesse v. Parker*, *supra*. Even though illiterate or physically disabled, it is hardly supposable that any witness might not take hold of the pen and make his mark.

² For in the case thus suggested, the policy of requiring two (or three) attesting witnesses is essentially observed at all events; and by a very slight stretch of construction, the agent might be treated as himself an attesting witness who subscribes another name with *bona fide* intent and meaning to authenticate the instrument.

a space of four centuries and commenting without a break upon the earlier and later enactments of Charles II. and Victoria, in both of which the same language is employed in this respect.¹

The design of the legislature in requiring witnesses to sign in presence of the testator, was, as English authorities state, that the testator might have ocular or other bodily evidence of the identity of the instrument subscribed by them; and this design the courts have kept steadily in view, while fixing upon the legal sense of the word "presence."² Consequently the testator's ability to see his witnesses sign, or at least to take personal cognizance of their act, has been regarded as the main test of compliance with the statute; not without some free play, perhaps, with the literal expression of the statute. Thus, if a testator, after having signed and published his will, and before the witnesses affix their signatures, falls into a state of insensibility or stupor (whether temporary or permanent), the attestation is not properly made.³ Nor is the statute satisfied, when the will is attested in a secret and clandestine manner, though the testator be present in the same room.⁴ Nor where the witnesses subscribe in the same room, or in an adjoining room with the door left open, and the testator, who had signed some time previously, was not made aware of it.⁵ In short, an attestation fails of legal sufficiency, whenever the testator, were he mentally capable of recognizing the act of subscription or not, was actually unconscious of it;⁶ and even though a statute should say nothing in express terms of subscribing "in his presence," we apprehend that the simple statute requirement of a subscription and attestation in addition to the testator's signature would justify the same legal conclusion.⁷

¹ Cf. Statutes, Appx.; 1 Wms. Exrs. 92.

² 1 Jarm. Wills, 86, 87.

³ Right v. Price, Dougl. 241.

⁴ Longford v. Eyre, 1 P. Wms. 740.

⁵ Jenner v. Finch, 5 P. D. 106.

⁶ 1 Jarm. Wills, 87.

⁷ The whole scope of our wills legislation, in requiring the testator to sign

or acknowledge before his witnesses, in assuming that he selects or requests persons to be witnesses, etc., seems to forbid the idea that they could subscribe and attest the will in a valid and legal manner, while he was wholly unconscious that they were doing so; and we should be reluctant to believe that this insufficiency depended wholly upon

§ 341. **The Same Subject.** — But aside from the testator's mental consciousness of the act of attestation, which is always essential, these words "in presence of" the testator are inconsistent with his physical separation from the witnesses at the scene of their attestation. One might issue directions or receive assurances while in a room not contiguous to his witnesses ; or indeed, in these modern days, converse by wire between houses which were miles apart ; but all this would be inconsistent with a subscription in bodily presence such as might enable the testator to keep in view the identity of the paper so subscribed. Nor is it certain that the policy of such legislation regards the testator's convenience alone on the occasion, as English authorities have stated ; for is not that "presence" equally desirable, from the witness's point of view, in order that the latter may judge of the testator's condition, of the identity of the instrument he is asked to sign, and of the *bona fides* of the whole transaction ? If attesting in the testator's absence, how lightly is his own solemn responsibility taken up, and how readily does he permit his position as a witness to be compromised.

Contiguity, therefore, with an uninterrupted view between testator and subscribing witness is deemed the main element to a physical signing in the testator's presence. The subscription is not invalidated by not having been performed in the same room or even the same house, provided it took place within the testator's range of vision. As in a case where witnesses left the testator, who lay in bed in one room, and subscribed their names at a table in another room opposite, and in sight, through a passage, the doors between being thrown open.¹ Or where a lobby intervened, but the testator might have seen the subscription made in a gallery, through the lobby and a broken glass window.² Or where a testatrix sat in her carriage, and the will was attested in the attorney's office, but not out of her sight.³ In all such cases, the attestation is held good on the theory that the testator might at those words "in presence of" the testator.

¹ Davy v. Smith, 3 Salk. 395.

² Shires v. Glasscock, 2 Salk. 688.

³ Casson v. Dadé, 1 M. & S. 294 ; 1 Bro. C. C. 99 ; Norton v. Bazett, 1 Deane, 259.

least have seen the signing, considering his position and the state of his health at the time of the transaction; and it is deemed immaterial that he did not see, when he might have done so; for the act being done in his presence, could not have been vitiated by his turning or looking away.¹

On the other hand, no mere contiguity to the witnesses will constitute a "presence" within the act, if the testator's position be such that he cannot possibly see them sign. As where, for instance, he occupies his bed-chamber, and the witnesses subscribe in an outer hall where they are necessarily hidden from his sight by an intervening flight of stairs.² Or where his position, which he cannot readily change, is such that the witnesses are in reality out of his sight.³ If the subscription be made in an adjoining room with the door closed, it is not enough that the testator might have seen it had the door stood open; nor even will a subscription in the room he occupies suffice, provided that from his actual position he could not have seen it done. But unless some material obstacle obstructs the vision, we here suppose that the testator is sick and feeble, propped up in bed, or requiring some aid in order to bring him into a right posture, in which case, of course, his disability is an important factor in determining whether or not he might have seen his witnesses subscribe. Thus the will of one who lay in bed with the curtains drawn while the will was attested in front of him, was admitted to probate because he might easily have seen the act by pushing the curtain aside;⁴ but that of another was refused probate under like circumstances upon the distinction that the testatrix was not only too weak to have opened the curtain herself, but lay helplessly with her back to the witnesses.⁵

¹ 1 Jarm. Wills, 87, 88; 1 Wms. Exrs. 92, 93.

² Eccleston v. Petty, Carth. 79.

Where the subscription takes place in a different room from that occupied by the testator, it must be shown that his position was such that he might have seen the act. Norton v. Bazett, Dea. & Sw. 259; 3 Curt. 118.

³ Wright v. Manifold, 1 M. & S. 29. And see 1 Jarm. 88; 1 Deane, 259; 1 Curt. 914; 2 Curt. 395; 3 Curt. 118; 1 Wms. Exrs. 92.

⁴ Newton v. Clarke, 2 Curt. 320.

⁵ Tribe v. Tribe, 1 Robert. 775; 1 Wms. Exrs. 92.

In fine, the true test as asserted in the English cases is, not whether the testator saw the witnesses sign, but whether he might have seen them sign, considering his mental and physical condition, and his posture at the time of their subscription;¹ and the result of the cases is to enjoin it carefully upon all those who are charged with the direction of such business, where the testator himself is weak and unable to move about freely, not to peril the validity of the will by any false delicacy about bringing witnesses and the sick person close together.

§ 342. **Subscribing "in Presence of" the Testator, etc.; American Rule.**— Though the judiciary of each State may construe this requirement of the testator's presence more or less lightly, the American rule adopts in the main the distinctions of the English cases. The policy of such enactments is understood in the same sense: namely, to prevent substitution and fraud upon the testator. And an attestation made in the same room with the testator is treated as *prima facie* an attestation made in his presence; while an attestation made in another room is *prima facie* not made in his presence; proof of the actual facts being admissible in either case to establish the contrary.²

Where, therefore, the witnesses sign the will in an adjoining room, out of the testator's sight as he lies on his bed, the statute fails of compliance, although the door between stands partly open;³ nor, as some extreme cases hold, does it even

¹ Trinnel's Goods, 11 Jur. N. S. 248; Kellick *Re*, 3 Sw. & Tr. 578. If the witnesses attest out of the testator's presence, it does not help the case that the fault of doing so was not theirs. 1 P. Wms. 239; 1 Jarm. Wills, 89.

² Neil *v.* Neil, 1 Leigh, 6; 1 Greenl. Ev. 12th ed. § 272; Mandeville *v.* Parker, 31 N. J. Eq. 242, 252; Lamb *v.* Girtman, 33 Geo. 289; 7 Harr. & J. 61; 5 Mon. 199. This seems likewise to be the English rule of presumptions in such cases. See preceding section. The general rule of our States, like that

of England, makes it unessential that witnesses should sign "in presence of" one another. *Supra*, § 327; 64 Md. 138.

In a very few States, the code drops the direction of a signing "in presence of" the testator by the witnesses. This avoids the doctrine of constructive presence. The New York code affords an instance in this respect. 4 Kent, 515; 11 Barb. 124; Lewis *v.* Lewis, 11 Kern. 220. See 5 Redf. N. Y. 316. See also the Arkansas rule as stated in 14 Ark. 675; 17 Ark. 292.

³ Mandeville *v.* Parker, 31 N. J. Eq.

avail that the testator could see the bodies of the witnesses as they wrote, if the will itself was beyond the range of his vision.¹ It is not enough to subscribe in the same room with the testator, where his relative situation forbids his perceiving the act.² Indeed, to speak generally, if the testator be ill, unable to change his position readily for himself, or confined to his bed, his posture at the time of attestation should be such as to enable him to perceive his witnesses subscribe; and ability to perceive is here construed with some reference to his physical condition at the time of subscription.³

But if, while the attesting witnesses are subscribing, the testator, conscious of the act, is in an adjoining room, where by the mere act of volition he can witness the attestation, this constitutes a subscription in his presence.⁴ And if thus conscious and capable of seeing the act with the witnesses, the more surely is the act done in his presence, when in the same room with him.⁵ Whenever, in fact, it appears that the subscription was done in the immediate or proximate and conscious presence of the testator, so that he could have seen it if he had felt disposed, there is no need of showing that he actually saw the witnesses subscribe their names.⁶ And if the testator enjoys normal health and may move about at pleasure, his change of place while they are signing will not be readily supposed to have deprived them of his presence.⁷

242; 7 Harr. & J. 61; *Boldry v. Parris*, 2 Cush. 433; *Lamb v. Girtman*, 33 Ga. 289; 6 Ga. 539.

¹ *Graham v. Graham*, 10 Ired. 219. But *cf.* *Bynum v. Bynum*, 11 Ired. 632; *Sturdivant v. Birchett*, 10 Gratt. 67.

² *Neil v. Neil*, 1 Leigh, 6; *Orndoff v. Hummer*, 12 B. Mon. 619; *Reed v. Roberts*, 26 Ga. 294; 23 Ga. 441; *Downie's Will*, 42 Wis. 66; *Aikin v. Weckerly*, 19 Mich. 482.

³ *Jones v. Tuck*, 3 Jones 202; *Russell v. Falls*, 3 Harr. & M. 463; *Reynolds v. Reynolds*, 1 Spears, 253; *Maynard v. Vinton*, 59 Mich. 139.

⁴ *Meurer's Will*, 44 Wis. 392; *Bynum v. Bynum*, 11 Ired. 632; *McElfresh v. Guard*, 32 Ind. 408; *Nock v.*

Nock, 10 Gratt. 106; *Bundy v. McKnight*, 48 Ind. 502; *Ambre v. Weishaar*, 74 Ill. 109.

⁵ 7 Jones, 593; *Pope v. Pickett*, 51 Ala. 584; 12 Ala. 687; *Mason v. Harrison*, 5 Harr. & J. 480.

⁶ *Allen's Will*, 25 Minn. 39; *Baldwin v. Baldwin*, 81 Va. 405; *Ayres v. Ayres*, 43 N. J. Eq. 565; *Walker v. Walker*, 67 Miss. 529.

⁷ *Wright v. Lewis*, 5 Rich. 212.

Not only the corporeal presence of the testator is essential to the validity of an attestation, but his mental accompaniment of their subscription. *Watson v. Piper*, 32 Miss. 451; *Meurer's Will*, 44 Wis. 392; *McGuire v. Kerr*, 2 Bradf. 244; *Aurand v. Wilt*, 9 Penn. St. 54; *Hall v. Hall*, 18 Ga. 40; *Jackson v.*

§ 343. **Subscription "in Presence of" a Testator Unable to see; Cognizance which dispenses with Sight.** — Where the testator is blind, or of vision so impaired that he cannot see the act of subscription, the witnesses, it is sometimes said, must sign where, if able to see, the testator might have seen them.¹ But the more natural statement appears to be that, if ocular cognizance by the testator is out of the question, the subscription should be made where he may take a genuine cognizance of the act by his other senses.² As most men can use their eyes when their wills are executed, vision is the usual and safest test of presence, but it is not the only one: for one may take note of the presence of another by his hearing or touch; and where one cannot use his sense of sight, but is sensible of what is being done, the witnesses subscribing in the same room, or in such close proximity as to be within the line of vision of one in his position who could see, and within his hearing, there is a sufficient subscription in his presence.³

At all events, the act should be performed in the conscious presence of the testator, and in such proximity to him that the bodily senses which he must needs rely upon may be used with fair advantage to ward off all deception.⁴ And one or

Moore, 14 La. Ann. 213. And see *Etchison v. Etchison*, 53 Md. 348. Consciousness on his part may consist with an occasional stupor. 67 Miss. 529.

¹ *Piercy Re*, 1 Robert. 278.

² *Ray v. Hill*, 3 Strobbh. 297; *Fincham v. Edwards*, 3 Curt. 63; *Riggs v. Riggs*, 135 Mass. 238.

³ *Morton, C. J.*, in *Riggs v. Riggs*, 135 Mass. 238, 241. *Ray v. Hill*, *supra*, is a case where the witnesses, when signing, were so near to the testator, a blind man, that he could have heard the scratching of their pens.

⁴ In a Massachusetts case (1883) the will and codicil were sustained which a testator made whose sense of vision had been affected by an injury. His sight was really unimpaired, but he was compelled to lie on his bed, looking upward, without turning his head. As

he lay in this position, each instrument was in turn executed. The will was signed by the witnesses at a table in the adjoining room, nine feet distant from the testator. The door was open, and the table was in his natural line of vision, had he been able to look. He could hear all that was said, and knew and understood all that was done, and after the witnesses had signed the will, it was handed to him, and he read their names as signed and said he was glad it was done. The codicil was executed while he was in the same prostrate condition; and here the witnesses attested at a table by the side of the bed, about four feet from his head, so that by turning his head, had he been able to do so, he could have seen them. *Riggs v. Riggs*, 135 Mass. 238.

In this case the court takes it for

two of our latest cases very sensibly repel the inference of these older precedents that subscription must be done in actual sight of the testator where all the circumstances show his complete cognizance in some other way of the subscription, so that fraud cannot have operated in the execution of that particular instrument.¹

§ 344. **Certificate of Acknowledgment Useless; Magistrate, etc., as a Witness.** — The certificate of acknowledgment usual in deeds is altogether superfluous in a will; but it may have the useful effect, provided all other formalities are consistent, of converting the notary or magistrate himself into one of the subscribing witnesses.² A clerk of a court who witnesses a will does not affect its validity by attaching his official seal and certificate; at the same time he should have dispensed with it.³

§ 345. **Re-execution, etc., if Necessary, should be conducted with Careful Regard for Formalities.** — Where a first attempt at

granted that other courts would have decided the question differently, upon a narrower construction of such a statute. This, however, appears by no means certain; for it is commonly admitted that subscription before a blind man constitutes an exception to the general rule; and here there was something like blindness, in a physical incapacity to see witnesses as they subscribed in the natural range of vision. The witnesses signed in this natural range of vision, and could not possibly have signed where he might actually see them, without taking an unnatural and ludicrous position. Consequently, this decision rested fairly upon the exception permitted in case of blindness.

"Certainly," observes Morton, C. J., "if two blind men are in the same room, talking together, they are in each other's presence. If two men are in the same room, conversing together, and either or both bandage their eyes, they do not cease to be in each other's presence. . . . It would be against the spirit of our statutes to hold that, because a

man is blind, or because he is obliged to keep his eyes bandaged, or because, by an injury, he is prevented from using his sight, he is deprived of the right to make a will." *Ib.* In fine, a case like the above should turn upon its peculiar necessity; and we are not to infer that a testator capable of seeing may bandage his eyes at discretion and then rely upon an attestation made out by the evidence of his other senses.

¹ *Cook v. Winchester*, 81 Mich. 581 (1890), is in point. The testatrix (as in *Riggs v. Riggs*, *supra*), though the witnesses signed out of the line of her vision, was within hearing distance, and understood what was done, and expressly approved at once the whole transaction, looking at the signatures and the will, in presence of the witnesses, after the subscription had taken place. *Sturdivant v. Birchett*, 10 Gratt. 67 (by a bare majority), sustains the same doctrine.

² *Murray v. Murphy*, 39 Miss. 214.

³ 64 Tex. 159; *Payne v. Payne* (Ark.) 1891.

executing a will fails through some informality, and a testator must go through the solemnity again with the same or other witnesses, care should be taken to conduct the new transaction with a scrupulous regard for all necessary forms, and to avoid the ready danger of fitting the first imperfect solemnities into the second, so that failure again follows imperfection. A witness who subscribes at the first attempt should re-subscribe, if serving at the second; for as his acknowledgment of a former signature is not good,¹ neither is it enough for him to retrace his former name with a dry pen² instead of a wet one, nor even to change his first signature, with the purpose, not of rewriting, but completing it as first written.³

§ 346. **Attestation Clause no Essential Part of a Will, but of Great Convenience.** — The Statute of Victoria expressly declares that “no form of attestation shall be necessary”;⁴ and aside from such enactments, a formal attestation clause is no essential part of a will, but the instrument may be well executed without it.⁵ It is sufficient, therefore, that the witnesses, with attesting intent, subscribe under or against the word “witnesses,” or use some other corresponding expression, or simply subscribe their names without any such expression at all.⁶

¹ *Supra*, § 338.

² *Casement v. Fulton*, 5 Moore P. C. 130; 1 Rob. 772; *Maddock, Goods of*, L. R. 3 P. & D. 169.

³ *Hindmarsh v. Charlton*, 8 H. L. Cas. 160; 2 Rob. 311.

On the other hand, where the testator indorses his will by way of ratifying its contents, but insufficiently for a re-execution, no attestation by witnesses to this indorsement can amount to an attestation of the will. *Patterson v. Ransom*, 55 Ind. 102. *Cf. Wright v. Wright*, 5 Ind. 389; *Dixon's Appeal*, 55 Penn. St. 424.

If a testator, after his will on various sheets of paper has been duly executed, takes out and destroys some sheets and substitutes others, leaving his original signature at the end, and the will is neither re-signed nor reattested, probate

may be refused. *Treloar v. Lean*, 14 P. D. 49. *Aliter*, where the attempt to change one's will is not so carried out as to destroy the identity of the executed will. 6 Dem. 262; *Woodward's Goods*, L. R. 2 P. D. 206. See Part IV. c. 1, *post*.

⁴ Stat. 1 Vict. c. 26, § 9, Appx.

⁵ 1 Wms. Exrs. 93; 1 Jarm. Wills, 85; *Roberts v. Phillips*, 4 E. & B. 450; 10 Paige, 85, *per* Walworth, Ch.; *Ela v. Edwards*, 16 Gray, 91.

⁶ A will without any words of attestation may be good. *Comyn*, 531; 2 Str. 1109; *Bryan v. White*, 5 E. L. & Eq. 579; *Ela v. Edwards*, 16 Gray, 91; *Baskin v. Baskin*, 36 N. Y. 416; 48 Barb. 200. The word “witness” or “witnesses” preceding the signature of the witnesses is sufficient. *Osborn v. Cook*, 11 Cush. 532; *Fry's Will*, 2 R. I.

Nevertheless, the use of an attestation clause, with full recital of the particulars usual in a careful execution, is highly to be commended; both as a guide in pursuing the formalities needful in so solemn a transaction, and for the sake, besides, of furnishing presumptive testimony that all has been rightly done, when subscribing witnesses are dead, forgetful, or beyond the reach of process. Nor matters it, that the execution, as thus recited, becomes more formal than the local statute insisted upon; for in simple details it is wiser to be needlessly particular than not particular enough.¹ As a statement of facts transpiring at the time when the will was executed, the attestation clause is useful as a memorandum to aid the attesting witnesses themselves in recalling the circumstances at the time of probate;² besides indicating that whoever directed the execution understood what formalities were needful and saw them pursued.³

If the will contains no attestation clause, no written memoranda to show *prima facie* in connection with the signatures that the legal essentials of execution were fully complied with, the propounder of the will is simply put to more onerous proof at the probate. The capricious memory of a subscribing witness is in such a case less easily guided; and should one or all of the witnesses happen to be dead or absent from the jurisdiction, or to testify unfavorably, satisfactory evidence from other sources would have to be adduced, showing to the reasonable satisfaction of court or jury that all the solemn-

88; *Conboy v. Jennings*, 1 N. Y. Supr. 622.

"It never has been held that a testimonium clause is necessary, or that the witnesses should be described as witnesses; nothing more is required than that the will should be attested [and subscribed] by the witnesses." 4 E. & B. 450. And see *Taylor v. Brodhead*, 5 Redf. 624.

¹ See form of attestation used in Appx.

A good form of attestation clause is as follows: "Signed, and sealed by the said testator, as and for his last will and testament, in the presence of us, who at his request and in his presence, and in

the presence of each other, have hereunto subscribed our names as attesting witnesses." This, it is perceived, recites some details useful on such an occasion, but not under most of our codes absolutely indispensable.

² *Roberts v. Phillips*, 4 E. & B. 457; *Taylor v. Brodhead*, 5 Redf. 624; *Ela v. Edwards*, 16 Gray, 91; *Cottrell Re*, 95 N. Y. 329.

³ *Walworth, C.*, in *Chaffee v. Baptist Convention*, 10 Paige, 85. It is a wise precaution to read over the attestation clause to the witnesses in the testator's presence before they sign.

ties required by the statute were in fact duly observed. It is safer, then, where no attestation clause is used, for the witnesses to subscribe under or against some such word as "witness" or "attest" than to sign with no explanatory word at all, and thus widen the uncertain range of oral and extrinsic proof.

§ 347. **Attestation Clause ; Proof that all Formalities were complied with, etc.** — The advantage of an attestation clause with suitable recitals is shown in many of our decisions relating to the proof of wills. Where, indeed, there is nothing but a formal attestation clause on one side, and the testimony decidedly adverse of both subscribing witnesses on the other, probate of a will has been refused.¹ But, with the aid of a proper attestation clause to contradict such persons, or possibly without it, wills have been established in proof, against the concurring statements of both subscribing witnesses or the statement of either, that the legal requirements of execution were not fully complied with.² And wherever these witnesses fail to recollect and give no positive testimony, or cannot, both or all, be produced in court, the clearer the recitals of an attestation clause, the stronger becomes the presumption that the will was executed in all details as the law requires.³ It matters little, under such circumstances, that subscribing witnesses cannot testify affirmatively to the facts

¹ *Croft v. Croft*, 4 Sw. & Tr. 10; *Woolley v. Woolley*, 95 N. Y. 231.

² 6 No. Cas. 699; *Wright v. Rogers*, L. R. 1 P. & D. 678. A regular attestation clause, regularly signed, and corroborated either by the circumstances surrounding the act, the testimony of other witnesses to the fact of due execution, or other competent evidence, may establish the due execution of the will against the positive testimony of the subscribing witnesses. *Cottrell Re*, 95 N. Y. 329. And see *McCurdy v. Neall*, 42 N. J. Eq. 333.

³ *Guillim v. Guillim*, 3 Sw. & Tr. 200; *Huckvale, Goods of*, L. R. 1 P. & D. 375; 1 Jarm. Wills, 86; *Cheatham v.*

Hatcher, 30 Gratt. 56; 1 Wms. Exrs. 101; 19 Hun, 630. It may justly be concluded that the memory of a witness has failed him, under these circumstances. *Pepoon's Will*, 91 N. Y. 255. Of course imputations more serious may affect his credibility, in some cases. If one subscribing witness testifies positively to the due execution of the will, the want of the memory of the other cannot overcome it. *Higgins's Will*, 94 N. Y. 554.

The testimony of a subscribing witness invalidating the will which he attested, ought to be viewed with suspicion. *Cheatham v. Hatcher*, 30 Gratt. 56. See 62 Iowa, 163.

thus recited; that the memory fails; that details are not orally shown with clearness.¹ And though the attesting witnesses were all dead or beyond the reach of process, proof of their handwriting would in general make out a *prima facie* case of due execution, which, if aided by the recitals of a full attestation clause, would afford a very strong presumption, unless the contrary appeared on the face of the will.²

But in no case will the presumption of compliance with all statutory formalities arise unless the will appears on its face to have been duly executed.³ And any such presumption is rebutted by clear proof to the contrary.⁴ Insufficient attestation is not to be set up collaterally against a will admitted to probate.⁵

§ 348. Subscribing Witnesses much relied upon; Effect of Other Testimony. — Subscribing witnesses are much relied upon to establish due execution of the will; nor can the testimony of persons accidentally present, who had nothing to do with the transaction, be entitled to equal consideration.⁶ Though strangers personally to the testator, their concurring testimony alone may well establish the due execution in which they participated;⁷ and even in a conflict of evidence great weight is given to their several statements.

¹ Meurer's Will, 44 Wis. 392; Brown v. Clark, 77 N. Y. 369; 2 Demarest, 482; Rugg v. Rugg, 83 N. Y. 592; 4 Redf. 165; 41 N. J. Eq. 284.

² Tilden v. Tilden, 13 Gray, 110; Lewis v. Lewis, 11 N. Y. 220; Vernon v. Kirk, 30 Penn. St. 218; Brinckerhoff v. Remsen, 8 Paige, 499; Ela v. Edwards, 16 Gray, 91; 10 Allen, 357; Deupree v. Deupree, 45 Ga. 415; Barnes v. Barnes, 66 Me. 286; Kellum Re, 52 N. Y. 517; Alpaugh's Will, 23 N. J. Eq. 507; Clarke v. Dunnavant, 10 Leigh, 13; Welch v. Welch, 9 Rich. 133. Especially if the attestation clause be written by the testator himself. Alpaugh's Will, *supra*. Or a professional man attended the execution. 4 Redf. 165. Or the testator wrote out his own will. Woodhouse v. Balfour, 13 P. D. 2.

If a will appears on its face to be duly executed, the presumption is that all was rightly done even though the attestation clause omit to state some essential particular. 1 Wms. Exrs. 101; 1 Robert. 5. Where a witness in fact attested a testator's signature, but the attestation clause described him as only attesting the signatures of two other witnesses, probate of the will was granted. Mason v. Bishop, 1 C. & E. 21.

³ 1 Jarm. Wills, 86.

⁴ As if it should be shown that the names of the witnesses were forged by the testator. Lee's Goods, 4 Jur. N. S. 490.

⁵ Leatherwood v. Sullivan, 81 Ala. 458.

⁶ Higgins's Will, 94 N. Y. 554.

⁷ Marx v. McGlynn, 88 N. Y. 357.

But as between such instances, one may from character, habits or surroundings, be more trustworthy than the other, where they disagree;¹ and the interested or disinterested nature of such testimony will often determine the weight to be given it. Nor is the probate of a will dependent on the recollection or veracity of any subscribing witness;² but other pertinent testimony may be adduced though the subscribing witnesses be not all dead, non-resident, or insane.³ Where subscribing witnesses cannot be found, after a diligent and honest inquiry satisfactory to the court, other evidence will be admitted to prove the signature.⁴ In these and similar points, the common rules of evidence will apply, subject to the local enactment.⁵

In general, the subscribing witnesses establish the signature to a will, and not its contents.⁶ Their declarations should be limited in proof accordingly. Even the declarations of the deceased himself as to the execution or contents of his will are only admissible under strict conditions; and his complete and duly executed will is not ordinarily to be affected by proof of past declarations which tend to dispute its plain tenor.⁷

§ 349. **Attestation to the Sanity of the Testator, etc.** — As a formal attestation clause may be dispensed with, so may the formal recital in such a clause that the testator appeared at the time of execution of sound mind, and to have executed the instrument voluntarily and without compulsion. Recitals

¹ A disinterested lawyer who attends to the execution and is experienced in such matters should carry great weight. *Neiheisel v. Toerge*, 4 Redf. 328.

² *Abbott v. Abbott*, 41 Mich. 540. Where neither of the attesting witnesses knows whether the testator, an infirm and aged person, nearly blind, could read the will or was advised of its contents, other testimony should be sought. *Cadmus v. Oakley*, 2 Demarest, 298.

³ *Reeve v. Crosby*, 3 Redf. 74; *Beables v. Alexander*, 9 Baxt. 604. All of the subscribing witnesses need not be sworn in a contest. *Cheatham v.*

Hatcher, 30 Gratt. 56; *Abbott v. Abbott*, 41 Mich. 540. But the absence of a subscribing witness whose testimony might have been obtained is a circumstance worthy of weight. And see New York code, § 2618, etc., referred to in *Graber v. Haaz*, 2 Demarest, 216.

⁴ *Givin v. Green*, 10 Phila. 99.

⁵ See *supra*, §§ 169–213.

⁶ *Baker's Appeal*, 107 Penn. St. 381; *Bott v. Wood*, 56 Miss. 136.

⁷ *Byers v. Hoppe*, 61 Md. 206; *Mercer v. Mackin*, 14 Bush, 434; *Shaw v. Shaw*, 1 Demarest, 21.

somewhat similar are sometimes prescribed, however, for the acknowledgment of a deed in specified instances; and the convenience of such a recital in a will is obvious. There are one or two American States whose codes favor at least, if they do not require, a formal attestation by the subscribing witnesses as to the sanity of the testator as well as his signature.¹

§ 350. "Credible" or "Competent" Witnesses: who are Such.—With a brief statement of the qualification of witnesses to a will, we shall close the present chapter. The Statute of Frauds required that every devise of land should be attested by "credible" witnesses;² an epithet for which "competent" has been substituted in most of our American codes as more precise and definite,³ while the Wills Act of Victoria drops the adjective altogether.⁴

By "credible" witnesses, the English law has understood such persons as were not disqualified from testifying in courts of justice by mental imbecility, crime or interest.⁵ In American practice, "credible" signifies the same as "competent"; that is to say, witnesses who are not disqualified to testify by the common-law rules of evidence at the time of attestation,⁶ as various codes are somewhat explicit in declaring;⁷ and hence a person convicted of crime might in most States legally witness a will, and the fact of his conviction could only be used to impeach his testimony.⁸

¹ See the Missouri Statute of Wills as cited in *Withington v. Withington*, 7 Mo. 589; also Ill. Rev. Stats. 1880, c. 148, p. 1108; *supra*, § 183.

² 1 Jarm. Wills, 70, 90.

³ In the Massachusetts code this substitution has taken place. Mass. Pub. Stats. c. 127, §§ 1, 2. See 83 Ky. 345, to the effect that "credible" in the statute means "competent."

⁴ See Act 1 Vict. c. 26, § 9; Appx. *post*. By § 14 of this enactment it is declared that a will shall not be void because of the incompetency of an attesting witness.

⁵ 1 Jarm. 70, 90; 1 Burr. 414.

⁶ *Sparhawk v. Sparhawk*, 10 Allen, 155; *Haven v. Hilliard*, 23 Pick. 10; *Eustis v. Parker*, 1 N. H. 273; *Rucker v. Lambdin*, 12 Sm. & M. 230; *Hall v. Hall*, 18 Ga. 40; *Lord v. Lord*, 58 N. H. 7; *Sullivan v. Sullivan*, 106 Mass. 474; next section; *Warren v. Baxter*, 48 Me. 193.

⁷ The word "disinterested" is used in some of our codes, still more precisely, so as to avoid changes under the general rules of evidence. *Jones v. Larabee*, 47 Me. 474.

⁸ *Robinson v. Savage* (Ill.) Am. Dig. 1888.

§ 351. **Competency on Common-Law Principle; as referring to Date of Subscribing, etc.**—Upon common-law principle, the qualification or disqualification of a witness is usually raised with reference to the time when he is called upon to testify. Nor is competency at that date to be left unconsidered; as where, for instance, a witness who subscribed while in sound mind, has become insane by the time the probate of the will is at issue, in which case, of course, his testimony cannot be taken. But his incompetency at this latter date does not defeat the will, whose attestation and subscription was a sort of testifying, such as the peculiar transaction called for. To surround himself with a specified number of witnesses at that time competent, was all that any testator could do, in compliance with the statute requirements; and what was then a proper execution in all respects taking place, a will was produced whose validity could never be impeached for informality.

Hence the rule, which reason should now pronounce the universal one, so far as the question remains a material one at all, that the competency of witnesses, like that of the testator, is tested by one's status at the time when the will was executed. If, therefore, a sufficient number of witnesses attest and subscribe properly who at that date are competent, the will remains valid, although death or supervening disability may render any or all of them incapable in fact of testifying by the time the will is offered for probate.¹ In other words, the inconvenience of this last situation is purely casual and incidental, and without direct prejudice to the will itself, which might, indeed, be established on mere proof of handwriting, where the instrument appeared on its face genuine and formal. The converse of this proposition holds also true; namely, that the will is invalid unless witnesses of a sufficient number attest and subscribe properly, who at the

¹ 2 Greenl. Evid. § 691; cases *supra*; body this rule of law. "If a witness to a will is competent at the time of his attestation, his subsequent incompetency shall not prevent the probate and allowance of such will." Mass. Pub. Stats. 1 Redf. Wills, 255, 256; Wyndham v. Chetwynd, 1 Burr. 414; 2 Str. 1253; Amory v. Fellowes, 5 Mass. 219; Sullivan v. Sullivan, 106 Mass. 474.

Some American codes expressly em- c. 127, § 2.

date of execution are competent.¹ For these attesting witnesses constitute the body-guard, so to speak, of the testator when he signs the will, and assure the present disposition as the free act of a capable mind. Hence, the execution would not be good if one of the attesting witnesses were at the time insane, or a little child incapable of understanding why he wrote or made his mark as others told him, even though it might happen by the time of probate that such witness had gained his full reason and understanding. But this converse principle has sometimes been relaxed out of favor to a will where one of the witnesses turns out at the probate court (as often unexpectedly happens) a legatee or an interested party; and, somewhat inconsistently, though on the whole justly, such a witness has been treated as competent to prove the will by releasing his legacy.² Legislation in modern times avoids the legal embarrassment of this exception, as we shall presently see.³

§ 352. **Mental Disqualification as a Witness; Disqualification of Children, Women, etc.** — We may lay it down safely that idiots, lunatics and insane persons are incompetent to serve as subscribing witnesses to a will; nor can the broadest legislation of our day which sustains the validity of a will against the incompetency of witnesses, be supposed to justify attestation of so impolitic a sort.⁴ Infants less than fourteen years may also be presumed incompetent witnesses, as they certainly are undesirable ones; but the real test being a

¹ 1 Greenl. Evid. § 69; *Anstey v. Dowling*, 2 Str. 1253, 1255; *Warren v. Baxter*, 48 Me. 193; *Morton v. Ingram*, 11 Ired. 368.

² See *Lowe v. Joliffe*, 1 W. Bl. 365; *Goodtitle v. Welford*, Dougl. 139; also comments of Judge Redfield in 1 Redf. Wills, 256, 257; 1 Jarm. Wills, 70. Mr. Jarman appears to be right in impugning the general theory that the "credibility" of a witness refers to any other period than the date of execution. *Ib.* Nevertheless, however inconsistently in principle, common-law courts came to recognize the right of a legatee

to testify at the probate after releasing his interest. Cases *supra*. But the ecclesiastical courts appear to have favored the opposite conclusion. 1 Jarm. Wills, *supra*; *Doe v. Hersey*, 4 Burn. Ecc. L. 27.

³ Acts 25 Geo. II. c. 6; 1 Vict. c. 26, §§ 14, 15; Mass. Pub. Stats. c. 127, § 3; *Jackson v. Denniston*, 4 Johns. 311; *post*, § 357.

⁴ 1 Jarm. Wills, 111, argues with force against the theory that Act 1 Vict. c. 26, § 14, dispenses with competent witnesses in any such sense as this.

defect of understanding in one so young, this presumption may be removed by proof to the contrary.¹ A minor above fourteen is *prima facie* competent.² One who does not understand the language in which the will is written is disqualified under the Roman, French and Spanish law, and in some American codes.³

Apart from considerations of marital interest presently to be noticed, our common law does not appear to raise any sexual barrier to the attestation act. But some of our local codes are peculiar in this respect. Thus in Louisiana women are made absolutely incapable of witnessing testaments, though they are held competent to prove a testator's handwriting when that fact has to be established on the probate.⁴

§ 353. **Disqualification of Interest in a Subscribing Witness.**—But the disqualification of interest is that which courts have chiefly to consider where the competency of a subscribing witness is drawn in question. One who has an immediate beneficial interest in a will is at the common law disqualified from becoming a subscribing witness thereto: he is neither "competent" nor "credible," in the sense of the statute.⁵ This policy extends to those beneficially interested who are not subscribing witnesses; and such persons cannot testify to the execution of a will.⁶

The interest, to be disqualifying, must be, however, a present, certain and vested interest.⁷ That one's mother or

¹ 1 Redf. Wills, 253, note; 1 Greenl. Evid. § 367; Carlton v. Carlton, 40 N. H. 14.

² Jones v. Tebbetts, 57 Me. 572. The rule here applied to infants is the usual one concerning the testimony of such persons. Schoul. Dom. Rel. 3d Ed. § 398.

³ Dauterive's Succession, 39 La. Ann. 1092. See ib. as to deaf persons, where a will is dictated.

⁴ Roth's Succession, 31 La. Ann. 315.

⁵ Hindson v. Kersey, 1 Burr. 97; Haven v. Hilliard, 23 Pick. 10; Sparhawk v. Sparhawk, 10 Allen, 155;

Frink v. Pond, 46 N. H. 125; Lord v. Lord, 58 N. H. 7.

⁶ Miltenberger v. Miltenberger, 78 Mo. 27. See Mercer v. Mackin, 14 Bush, 434.

A devisee under a holograph will is competent to prove it; for such a will requires no attesting witness. Hampton v. Hardin, 88 N. C. 592.

⁷ 1 Greenl. Evid. § 390; 4 Stark. Ev. 745; Jones v. Tebbetts, 57 Me. 572; Hawes v. Humphrey, 9 Pick. 350; Lord v. Lord, 58 N. H. 7. And as to a married woman's will, see Camp v. Stark, 81* Penn. St. 235.

father is named as principal devisee does not render a witness incompetent to subscribe, even though the latter receive a gift besides at the date of execution.¹ An heir at law, who is disinherited, is likewise a competent witness in support of the will which disinherits him; so, too, when he takes a legacy under the will of less value than his interest would have been without the will.² And, generally speaking, a witness may be produced to testify against his interest without legal disqualification.³ If it stand indifferent to the witnesses whether the will under which they are legatees and which they have subscribed be valid or not, they are pronounced credible.⁴

§ 354. **The Same Subject: Judges, Executors, Incorporators, etc.**—A judge of probate or other judicial officer is a competent subscribing witness to a will; at all events, where the issues of probate may be tried before some one else.⁵ Nor is an executor, according to current opinion, incompetent, even though by the American rule his right to commissions and compensation gives him a sort of pecuniary interest under the will;⁶ while the English statute of Victoria expressly declares (in a country where such trusts have always been esteemed voluntary and gratuitous) that an executor shall be an admissible witness.⁷ Nevertheless, we regard an executor who intends to accept the trust as a most undesirable person for subscribing witness, and one whose bias in a close contest might break down the will; and some States appear to

¹ *Nash v. Reed*, 46 Me. 168; *Allen v. Allen*, 2 Overt. 172. And see *Old v. Old*, 4 Dev. 500.

² *Smalley v. Smalley*, 70 Me. 545; *Sparhawk v. Sparhawk*, 10 Allen, 155; § 358.

³ *Clark v. Vorce*, 19 Wend. 232; 1 Greenl. Evid. § 410.

⁴ *Bac. Abr. Wills, D.* Or "disinterested." 70 Me. 548.

⁵ *McLean v. Barnard*, 1 Root, 462; 2 Root, 232. Statutes are sometimes specific on this point. And see as to the alcade under Mexican law, *Panaud*

v. Jones, 1 Cal. 488. See also 79 Me. 25; *supra*, § 23.

⁶ *Wyman v. Symmes*, 10 Allen, 153; *Reeve v. Crosby*, 3 Redf. 74; *Stewart v. Harriman*, 56 N. H. 25; *Murphy v. Fogg*, 7 Fla. 292; *Richardson v. Richardson*, 35 Vt. 238. Our local codes are frequently explicit on this subject. See 1 *Jarm. Wills*, 73, *Bigelow's note*.

⁷ Stat. 1 Vict. c. 26, § 17. An executor who is entitled to a legacy in that character may be a competent witness if he releases his legacy. 2 *Curt. 72*; 1 *Wms. Exrs.* 345. And see *Bettison v. Bromley*, 12 East, 250.

regard an executor as competent only when, having declined or renounced the trust, he is clearly disinterested.¹

An original corporator and member of a charitable corporation is a competent witness to a will which gives property to the corporation.² And so may be an inhabitant of some town or municipal corporation to which property is devised or bequeathed for educational purposes.³ For here the individual's beneficial interest is deemed too remote to disqualify him from testifying in favor of the will.⁴ A bequest to a person strictly in trust for another is not to be pronounced a direct beneficial interest such as to disqualify him.⁵

§ 355. **The Same Subject: whether Husband and Wife are Competent for One Another.**—The wife, according to the better opinion, should not be witness to her husband's will, nor the husband to his wife's will; a rule which conforms to the old law of coverture.⁶ And where a devise or bequest is given to either the husband or wife of an attesting witness, such witness is usually to be deemed a disqualified party.⁷ In view, however, of our later marital policy, more favorable to the independence of spouses than formerly, it is well for the statute of wills to be more precise on this point, and the Statute of Victoria furnishes an example accordingly.⁸

¹ See *Snyder v. Bull*, 17 Penn. St. 54; *Tucker v. Tucker*, 5 Ired. 161; *Schoul. Exrs.* § 76; *Jones v. Larrabee*, 47 Me. 474; *Burritt v. Silliman*, 13 N. Y. 93. In Scotland, where the executor was one of the attesting witnesses, it was held that the testament was null as to his appointment, though it would stand in other respects. *Tait Evid.* 84.

An executor may release his pecuniary interest under the will and stand the better qualified as a witness. 3 Redf. 74.

² *Quinn v. Shields*, 62 Iowa, 129.

³ *Cornwell v. Isham*, 1 Day, 35; *Warren v. Baxter*, 48 Me. 193; *Loring v. Park*, 7 Gray, 42; 1 N. H. 273; *Jones v. Habersham*, 63 Ga. 146; 79 Me. 25.

⁴ But if the will were in favor of some private business corporation, *semble* that

a stockholder therein would be disqualified by reason of interest. Though not where the aim of the bequest is charitable. *Marston Ex parte*, 79 Me. 25.

⁵ *Creswell v. Creswell*, L. R. 6 Eq. 69. And see *Loring v. Park*, 7 Gray, 42. But as to making the trustee under the will a competent witness, note what is said as to executors, *supra*.

⁶ *Pease v. Allis*, 110 Mass. 157; *Dickinson v. Dickinson*, 61 Penn. St. 401.

⁷ *Sullivan v. Sullivan*, 106 Mass. 474; *Winslow v. Kimball*, 25 Me. 493; 1 Johns. Cas. 163. *Contra*, *Hawkins v. Hawkins*, 54 Iowa, 443; 70 Iowa, 343. This rule is liable, of course, to be affected by the latest "married women's legislation" in any State. See *Giddings v. Turgeon*, 58 Vt. 106.

⁸ See Act 1 Vict. c. 26, § 15, which

§ 356. **Creditor or Remote Beneficiary, whether a Competent Subscribing Witness.**—Whether a creditor must be treated as an incompetent subscribing witness to a will by reason of his direct interest under certain circumstances, is not clearly determined. But the policy of English and American legislation prevents their disqualification even where the will makes an express charge of real or personal property to secure the debt.¹ Persons to be remotely benefited under a will are not readily to be pronounced incompetent witnesses, so as to imperil a will; and where there is a sufficiency of witnesses, after leaving out one of doubtful competency, the will, of course, is to be upheld.²

§ 357. **Legacies or Devises to Attesting Witnesses annulled by Statute.**—We have observed that the hardship of breaking down a will, through some inadvertent selection of a witness who himself might have been quite unconscious of his interest, led common-law courts to avoid the worst mischief by permitting such a witness to release his interest at the probate, and so render himself competent.³ But this permission, which was not clearly conceded by all tribunals, must have been liable to great abuse; it was accorded against legal consistency; and the very option to release invested such a witness with such undue power for destroying or saving the will at his own choice, that sinister, secret, and corrupt bargains for purchasing his good will must have followed. The English Parliament soon adopted another expedient for avoiding the sacrifice of an entire will on the one hand, and the arbitrary choice of an interested witness on the other; namely, to annul all beneficial devises and legacies to attesting witnesses, and render such persons competent to all

annuls all gifts to the husband or wife of an attesting witness.

¹ The English statute 25 Geo. II. c. 6, § 2, expressly provides that creditors whose debts are charged by a will or codicil shall, nevertheless, be good subscribing witnesses. And this provision is confirmed and extended by Act 1 Vict. c. 26, § 16.

Similar legislation may be found in Massachusetts, New York, New Jersey, and many other American States. 1 Jarm. Wills, 71, 73, and Bigelow's note. Stimson's Am. Stat. Law, § 2648.

² See *Faux Re*, W. N. 249 (1888).

³ *Supra*, § 351.

intents in spite of a testator's heedlessness or their own. This doctrine, which was first embodied in Stat. 25 Geo. II. c. 6, has been extended and firmly established by the Act 1 Vict. c. 26.¹

In most parts of the United States similar legislation may be found, and witnesses to a will are rendered incapable of taking any beneficial interest under the will, unless there be the statutory number of competent witnesses without them.² Harsh as such a policy may be thought, it appears to work well; more care is taken than formerly in the attestation of wills, and the rules of evidence are greatly simplified.

But in a few American States a legatee is rendered competent, by express legislation, if he release or refuse to accept his legacy.³

§ 358. Competency of Interested Witnesses; Miscellaneous Legislation; Devise to Heir, etc.—In Maryland, under a late statute, an interested witness may be considered competent to subscribe or sustain a will.⁴ And there are other recent acts which expressly provide that a will shall not be void on account of the incompetency of the attesting witnesses.⁵

¹ See 1 Jarm. Wills, 71, 72; Appx. *post.* Section 15 of the act of Victoria annuls every beneficial devise, legacy, interest, gift, etc., to any attesting witness, or the wife or husband of such witness. The annulment applies of course only to the instrument actually attested, and not so as to invalidate one's interest under another will or codicil. *Tempest v. Tempest*, 2 Kay & J. 635; *Denne v. Wood*, 4 L. J. 57. Under this English statute, a trustee who is a solicitor, loses a right given him under the will to charge for professional services if he attests. *Burgess v. Vinicombe*, 31 Ch. D. 665; 34 Ch. D. 77; 40 Ch. D. 1.

² See 1 Jarm. Wills, 71, Bigelow's note. New Hampshire, Massachusetts, Connecticut, New York, Virginia, Kentucky, Mississippi, and most of the north-western States have adopted provisions of this character. In New York and

various other States, the share which such a witness would have had in the estate had the will not been made to him is expressly saved to him. (See next section.) A legatee dying before the testator is also pronounced a legal witness in some of our codes. And see 6 Mackey 98, as to the District of Columbia; and in general, Stimson's Am. Stat. Law, § 2650. Where two witnesses would suffice, and three persons actually subscribe, one of whom proves a devisee named in the will, it is fair to treat such a devisee's signature as superfluous. See 103 N. C. 40.

³ See statutes of New Jersey, Missouri, etc., referred to in 1 Jarm. Wills, 71, Bigelow's note; Stimson's Am. Stat. Law, § 2650; *Nixon v. Armstrong*, 38 Tex. 296.

⁴ *Estep v. Morris*, 38 Md. 417; *Kumpe v. Coons*, 63 Ala. 448.

⁵ See the peculiar and somewhat

In nearly all of our United States a devise or bequest to a person who would inherit under the laws of distribution does not invalidate the will or render such person incompetent as a witness; but the devise or bequest is good only so far as it does not exceed what he would have taken by inheritance in the event of intestacy.¹

vague expression of 1 Vict. c. 26, apply. Mass. Gen. Stats. c. 131, §§ 13, § 14.

Recent statutes which extend the competency of interested witnesses and original parties to testify in civil and criminal proceedings, often make express exception of the attesting witnesses to a will or codicil; for here peculiar considerations are found to

15; *McKeen v. Frost*, 46 Me. 248; *Miltenberger v. Miltenberger*, 78 Mo. 27.

¹ This seems to be the purport of such codes, though the language somewhat varies. Stimson's Am. Stat. Law, § 2651. And see *supra*, § 23; *Maxwell v. Hill* (Tenn.) 1891.

CHAPTER IV.

NUNCUPATIVE OR ORAL WILLS.

§ 359. **Wills and Codicils usually require a Formal Execution; Exceptions stated; Unattested Wills, Oral Wills, etc.** — Wills, under the policy of our modern legislation, English and American, are generally to be executed with all the formalities of written expression, signature, and attestation, which our preceding chapters have set forth in detail; and under the term “wills” in this connection are included codicils and every sort of testamentary disposition.

But, as we have shown, there are various American codes which dispense to some extent with the formal attestation of witnesses;¹ and holograph wills, or those written out by the testator’s own hand, are peculiarly favored in this respect, especially when the disposition relates to personal property only.² But wills of this character, though informally executed in a certain sense, must not only be expressed in writing, but, as the code itself declares, receive the testator’s signature to authenticate it. There remains, however, for consideration a class of wills still more informal in character, and in fact founded upon a testamentary disposition purely oral, though afterwards committed to writing. These oral or unwritten wills, properly styled, where non-execution is in the broadest sense an incident, let us now proceed to consider.

§ 360. **Oral or Nuncupative Will; Definition; Such Wills rarely permitted.** — This oral will is usually designated at our law by the term “nuncupative,” which we borrow, like the testament of this character, from the Roman civilians. A nuncupative will is an oral will declared by a testator before witnesses, and afterwards reduced to writing. The law sup-

¹ *Supra*, § 254.

² *Supra*, § 255.

poses such a will to be made *in extremis* or under circumstances fairly equivalent, such as prevented him from executing a more formal one.¹ We shall see presently, however, that the instances are very rare where testaments of this description are by our modern English-inspired codes allowed any legal validity, those exceptions being specified by the local statute itself.

§ 361. **History of Nuncupative Wills prior to the Statute of Frauds.**—In the ancient days of our common law, and before the general cultivation of letters, the doctrine of nuncupative wills appears to have maintained a firm footing. Derived from the Roman jurisprudence originally, it was incorporated into our system, and acted upon *proprio vigore*, long before the Statute of Frauds and the Statute of Wills. According to the Institutes of Justinian, if one wished to dispose of his effects by what our common law denominates a nuncupative or unwritten testament, he might do so by a verbal declaration in the presence of seven witnesses.² No immediate reduction to writing of such a testament appears to have been necessary; but the disposition might rest in parol proof until after the testator's death; though such was not always the case. It was sufficient if the witnesses, within a reasonable time after the death of the testator, went before a magistrate, and gave an account of what took place; a formal statement being then drawn up and signed, the proof of the will was perpetuated.³

¹ 4 Kent, Com. 576; 2 Bl. Com. 500; Bouvier Dict. "Nuncupative Will"; *supra*, § 6.

² Just. Inst. lib. 2, tit. 10, § 14.

Although the "nuncupative will" is, by our time-honored phrase, the unwritten will above described, we may well question whether the *nuncupatio* of the civilians was necessarily confined to such wills. The essence of this *nuncupatio* seems to have consisted rather in an oral publication of what had been written or unwritten. "In this latter passage of the proceeding the testator

either orally declared to the assistants the wishes which were to be executed after his death, or produced a written document in which his wishes were embodied." Maine's Ancient Law, 212. The Louisiana code, as we shall presently see, conforms quite closely to such a theory of nuncupative wills; stating them such because they were openly declared, in distinction from wills secretly expressed.

³ See *Prince v. Hazleton*, 20 Johns. 519.

Such, in general substance, was the nuncupative will of the common law, as Swinburne described it, with the requirement omitted of so many witnesses; and yet admitting of a purely verbal disposition until, from the lips of a witness or witnesses sufficient for proving it, the will was put into writing and properly shaped for permanent preservation and record. The testator uttered his wishes; it did not follow, however, that he inspected what was afterwards written out, but usually the reverse, as his death speedily followed. "In making a nuncupative will," says Swinburne, "this is chiefly to be observed, that the testator do name his executor, and declare his mind by word of mouth, without writing before witnesses; no precise form of words is required, so that the testator's meaning do appear."¹ And again he observes: "A nuncupative testament, is when the testator, without any writing, doth declare his will before a sufficient number of witnesses. It is called nuncupative, because, when a man makes such a testament, he must name his executor, and declare his whole mind before witnesses."² Perkins, in his book which was published under Henry VIII., still earlier,³ defines a nuncupative will, as properly made when the testator "lieth languishing for fear of sudden death, dareth not to stay the writing of his testament, and, therefore, he prayeth his curate and others, his neighbors, to bear witness of his last will, and declareth by word what is his last will."⁴ Whether in the days of our English law, nuncupative wills were necessarily to be pronounced invalid, unless made *in extremis*, or when one was sick and in fear of death, is uncertain; probably before the fifteenth century they were not, nor perhaps were they even as late as the enlightened times

¹ Swinb. pt. 4, § 29, p. 350.

² Swinb. pt. 1, § 12, p. 58. That the naming of an executor is not an essential to any will in modern times, nor a total disposition of the estate, see *supra*, § 297; *Hubbard v. Hubbard*, 8 N. Y. 202. The term "nuncupative" is appropriate because of this declaration before witnesses. *Supra*, § 6.

³ Swinburne's treatise was published in the time of James I.

⁴ Perkins, § 476. Perhaps this describes the actual instance or occasion when nuncupative wills are desirable, and the safe mode of making them, rather than undertaking to define the true limits of such testaments.

of Henry VIII., Elizabeth, and the first James. But by the latter date nuncupative wills were certainly confined in practice to extreme cases, as both Perkins and Swinburne intimate.¹ Under the Roman law, with its strong array of surrounding witnesses, sickness and last extremity made no indispensable condition of such testaments; probably, because the safeguards against fraud were sufficient without it.²

§ 362. **Nuncupative Wills affected Personal but not Real Estate.**—The nuncupative will, under such conditions, was as efficacious as any testament in writing, so far as related to the testator's personal estate alone. But lands, tenements and hereditaments, being the subject of devise by force only of the statutes of Henry VIII. (32 and 34 Hen. VIII.), a nuncupative devise must have been of too informal a character to operate.³

§ 363. **Restraints upon Nuncupative Wills under the Statute of Frauds.**—In the twenty-eighth year of Charles II., a case was tried which involved a foul conspiracy to set up a nuncupative will. A man advanced in years married a young woman whose conduct during his life exposed her to scandal. After his death, she set up as against a written will he had made three years before, a nuncupative testament, said to have been made by him while *in extremis* before nine witnesses. The court of probate rejected this later testament,

¹ Swinburne observes: "This kind of testament is commonly made when the testator is very sick, weak, and past all hope of recovery." Swinb. pt. 1, § 12, p. 58. Woodworth, J., in *Prince v. Hazleton*, 20 Johns. 519, considers the impression erroneous that our law differed at all from the civil, in making it of the essence of a nuncupative will that it be made *in extremis*. But the language of Chancellor Kent (ib. 511), which gives a more literal import to the expressions of Swinburne and Perkins in the passages above cited, concludes that while unwritten wills were not al-

ways bad at common law unless *in extremis*, they had by Swinburne's time become confined practically to such instances; a doctrine which the English law writers had ever since supported. And see 42 N. J. Eq. 625.

² Opinion of Woodworth, J., in *Prince v. Hazleton*, *supra*, where, however, the precaution of requiring seven witnesses is not taken sufficiently into account, nor the comparative illiteracy of Romans, nor the peculiarity of their social institutions.

³ *Supra*, §§ 15, 253. And see § 365, *post*, for rule of American codes.

and on appeal to the delegates and a trial held at the King's Bench it appeared in proof that most of the witnesses for the nuncupative will were perjured and that the widow herself was guilty of subornation of perjury. Lord Chancellor Nottingham said on this occasion that he hoped "to see one day a law, that no written will should ever be revoked but by writing."¹

Lord Nottingham, it is known, bore a conspicuous part in procuring the passage of the Statute of Frauds in Parliament, which famous enactment bears the date of 29 Charles II. (1676-77), or the year following.² The frauds and perjuries to which nuncupative wills were liable made one of the objects which that legislation sought to correct. Accordingly, such testaments were at once laid under strong restrictions which English policy has never since taken off. And the only real and lasting exception to these restrictions was declared in favor of "any soldier being in actual military service, or any mariner being at sea"; the British army and navy being thus secured in the full benefit of that testamentary privilege which the Roman soldier had enjoyed.³

"For prevention of fraudulent practices in setting up nuncupative wills, which have been the occasion of much perjury," the Statute of Frauds prescribed as follows, with the reservation, above noticed, in favor of soldiers and mariners. No nuncupative will shall be good where the estate bequeathed exceeds the value of thirty pounds, (1) unless it is proved by the oath of three witnesses at least who were present at the making thereof; (2) nor unless it is proved that the testator at the time bade the persons present, or some of them, to bear witness that such was his will, or to that effect; (3) nor unless such will was made in the time of the testator's last sickness, and in his dwelling house, or where he had resided for at least ten days next before making the will, except where he was surprised or taken sick

¹ *Coles v. Mordaunt*, 4 Ves. 196, note.

² Concerning the origin of that statute, and the hand taken by Lord Hale and others in shaping so renowned a piece

of legislation, see 18 Am. Law Rev. 442 (1884).

³ Act 29 Car. II. §§ 19-23.

while away from his own home and died before he returned ; (4) nor generally¹ unless the substance of the testimony to prove such a will was committed to writing within six days after the will was made. The same statute introduced new safeguards against the hasty probate of nuncupative wills ; and proceeded to declare that no written will should be repealed or altered by oral words not reduced into a written shape during the testator's life and allowed by him before three witnesses at least.²

§ 364. **Nuncupative Wills virtually abolished by Statute of Victoria, except as to Soldiers and Mariners.**— Even under these restraints, the nuncupative will has become obnoxious to modern policy, and since 1837 has been virtually abolished in England. For now by the new Statute of Wills (1 Vict. c. 26) nuncupative wills, and indeed testaments of all kinds which are informally executed, are altogether invalid and of no legal effect.³ But the old exception in favor of soldiers and mariners has by this act been expressly retained ;⁴ and that exception, let us constantly remember, applies, like the old nuncupative disposition itself in all other instances, to wills of personal property only ; since at our Anglo-Saxon law, land cannot be devised except by some testamentary writing duly signed and attested before the requisite number of witnesses.

§ 365. **American Legislation and Policy concerning Nuncupative Wills.**— Our brief description of the English law on this subject shows that two modern periods of nuncupative jurisprudence are of peculiar interest : I. That of 1677–1837, covered by writers like Blackstone, when soldiers and mariners in service might make such wills freely, but no other

¹ Ib. § 20. " After six months passed after the speaking of the pretended testamentary words " (says the statute), " no testimony shall be received to prove," etc., except as stated above.

² Stat. 29 Car. II. §§ 19–23.

³ Act 1 Vict. c. 26 (1837) ; 1 Wms. Exrs. 116 ; Appx. *post*.

⁴ " Any soldier being in actual military service, or any mariner or seaman being at sea, may dispose of his personal estate as he might have done before the making of this act." Act 1 Vict. c. 26, § 11.

persons, save under the peculiar restraints imposed by the Statute of Frauds. II. That subsequent to 1837, when none are permitted to make them at all except the soldiers and mariners as above stated.

Now in examining the American codes on this subject we find, naturally enough, enactments in many of the older States which are based upon the Statute of Frauds, and incorporate most of the restrictions in substance of this first period. But, to take the latest codes and the enactments now in force on this subject, the general invalidity of nuncupative wills, except as to soldiers and mariners, and of all testaments which are not properly written out, signed, and attested as the local act directs, or, in other words, the policy of the second period, is found a prominent trait; New York, Massachusetts, and Virginia being among the States which conform closely to the latest English policy on the subject.¹

But while American policy at the present day discourages such testaments, there are great variations of principle under which they are permitted in the several States. Many of our local codes, embracing every quarter of the Union, test the validity of the nuncupative will by the amount to be disposed of; the limit ranging usually from \$30 to \$500, while in California and Nevada \$1000 may be thus bequeathed.²

¹ When the leading American case of *Prince v. Hazleton* (20 Johns. 503) was decided in the New York Court of Errors in 1822, the law of New York on this subject was literally that of the statute of Charles II., from which it was taken. That case shows plainly the disfavor with which Chancellor Kent and other leading jurists of that State regarded the setting up of such testaments as made by those who were neither soldiers nor sailors. The law was afterwards changed, and now conforms to that of England under the statute of Victoria. No nuncupative or unwritten will is valid, "unless made by a soldier while in actual military service, or by a mariner while at sea." *Hubbard v. Hubbard*, 8 N. Y. 196; 2 Rev. Stat. N. Y. p. 60, § 22.

In Massachusetts, it is provided that "a soldier in actual military service, or a mariner at sea, may dispose of his estate by a nuncupative will"; and the context shows plainly that nuncupative or informally executed wills are in other instances of no validity. Mass. Pub. Stat. c. 127, §§ 6, 7.

Recent codes of Virginia, West Virginia, Minnesota, Rhode Island, Kentucky, Minnesota and Oregon confine the right of making nuncupative wills to soldiers in active service and mariners at sea. And see Stimson's Am. Stat. Law, § 2700; Turner, *Ex parte*, 24 S. C. 211.

² See local enactments collected in 1 Jarm. Wills, 97, Bigelow's note; 3 Jarm. Wills, 755, Randolph's and Talcott's notes. This limitation of value, so as to

California, again, adds to the privileged class of soldiers and sailors persons who are expecting immediate death from injuries received the same day.¹ Nor should we overlook the moulding influences of Continental Europe in such States as Louisiana, under whose code the nuncupative testament signifies broadly an open testament, while the old nuncupative will, as our common law understands it, has been essentially abolished.²

In general, nuncupative wills, under our American codes, cannot dispose of lands, but of personal property only; following in this respect the rule of England and the common law.³

sanction nuncupative dispositions of petty estates, is one of the remnants of the old Statute of Frauds. See *supra*, § 363. Among the States which treat nuncupative wills of property beyond a specified amount as invalid are the following: Maine, New Hampshire, Vermont, New Jersey, Delaware, Maryland, the two Carolinas, Alabama, Texas, Mississippi, Missouri, Wisconsin, Indiana, Michigan, Iowa and Arkansas.

¹ California code (Ed. 1876), § 6289. See also Stimson's Am. Stat. Law, § 2701. The idea of permitting a nuncupative will in cases of one's sudden illness and death while away from home, is expressed with more or less favor in various local codes. Stimson, *ib.* § 2702.

² In Louisiana, verbal testaments are now abrogated, and nuncupative or open wills, like mystic or sealed wills, must be in writing. The civil code of this State divides all testaments into these three classes: (1) Nuncupative or open testaments; (2) mystic or sealed testaments; (3) holographic (or olographic) testaments. See *supra*, §§ 6, 361. Upon this fundamental division is based the jurisprudence of this State relative to nuncupative wills, and citations from Louisiana reports must be understood accordingly. The method of making nuncupative testaments, either by public act, or by act under private signature, is fully set forth in the revised civil code

of that State. See Rev. Civ. Code La. § 1567 *et seq.* The nuncupative testament by public act is received by a notary public in presence of three resident or five non-resident witnesses; it is dictated by the testator, written out by the notary, read over and signed by the testator and witnesses. The nuncupative testament by act under private signature is written by the testator himself, or by any other person from his dictation, etc.; and here, too, the formalities are quite strict, as to reading the will over in the presence of witnesses, after which the paper is duly signed and attested; five resident or seven non-resident witnesses being here required except in specified instances. See also *Wood v. Roane*, 35 La. Ann. 865; *Adams v. Norris*, 23 How. 353. The will, when written out, must contain the declaration that it was written by the notary; evidence *aliunde* on this point is inadmissible. *Dorrie's Succession*, 37 La. Ann. 833. As to dispensing with proof that the testator dictated it, when written out of the presence of witnesses, see 39 La. Ann. 294. See also 41 La. Ann. 1109, 1153; 39 La. Ann. 1092; 42 La. Ann. 1086.

³ See *supra*, § 362. Some of our codes are, perhaps, capable of a different construction; but if so, the right is created by the local statute. It has been repeatedly declared, in construc-

§ 366. **Soldiers, Mariners, etc. . who constitute this Privileged Class.**—Who constitute, we may first ask, this privileged class, which in England and many of our States have constantly been permitted to dispose of their personal property, their wages, goods and chattels, by word of mouth, to the exclusion at length of all others; and who under all American codes stand at least as well off as others in such testaments? The words of the statute sufficiently explain for the most part: they are soldiers in actual service and mariners at sea, or by whatever similar expression the legislature may have described them.

English and American courts agree in giving to this language of the codes a very liberal interpretation. The term "soldier" as thus applied is not confined to those who serve in the ranks, but embraces every military grade from private to commander-in-chief; it includes generals, regimental and line officers, those assigned to field or staff duty, surgeons, all who hold commissions or warrants, or are borne on the rolls as enlisted men, provided the condition of "actual military service" be fulfilled.¹ English courts have treated persons in the military service of the East India Company as "soldiers";² nor can we doubt that regulars and volunteers, when enrolled and serving at the call of government in some crisis, belong equally to this privileged class;³ though members of the volunteer militia and home reserves certainly do not, while pursuing their peaceful occupations as citizens, or parading for drill or pleasure. As to "mariners," a like liberal construction prevails, and the whole marine service is included, superior officers up to the highest in command as well as common

tion of the local enactment, that no power is thereby conferred to dispose of real estate by a nuncupative will, no such right having existed at the common law. *Page v. Page*, 2 Rob. (Va.) 424; *Smithdeal v. Smith*, 64 N. C. 52; *Palmer v. Palmer*, 2 Dana, 390; *Campbell v. Campbell*, 21 Mich. 438; *McLeod v. Dell*, 9 Fla. 451; *Sadler v. Sadler*, 60 Miss. 251. But the Ohio statute has been construed as conferring such a right. *Ashworth v. Carleton*, 12 Ohio

St. 381; 10 Ohio, 462. So recently has that of Texas. *Moffett v. Moffett*, 67 Tex. 642, and cases cited. *Cf.* 70 Tex. 18.

¹ *Donaldson, Goods of*, 2 Curt. 386; 5 Notes Cas. 92; 3 Curt. 537; *Van Deuzer v. Gordon*, 39 Vt. 111; *Leathers v. Greenacre*, 53 Me. 561.

² *Donaldson, Goods of*, 2 Curt. 386.

³ See *Van Deuzer v. Gordon*, 39 Vt. 111; *Leathers v. Greenacre*, 53 Me. 561.

seamen. The purser of a man-of-war is a mariner, in this sense, and so are all others who belong to the navy;¹ and to those, moreover, in the merchant service, does the same privilege extend, to the captain, for instance, of a coasting vessel, or the cook on board a steamer.² For though the defenders of the government by land seem in the one case to be singled out for this testamentary honor, they who defend by sea are not the only recipients of favor in the other, nor is the correspondence of the two classes complete.

§ 367. **The Same Subject.**— But the restrictions under which soldiers and mariners are expressly laid by the language of the act in question curtail the privilege considerably. Nor is this curtailment the same in either instance. (1) The soldier has no special privilege of nuncupation by our law unless “in actual military service,” that is to say, “while engaged in an expedition,” for these terms are taken by the courts as synonymous. As one of a privileged class he may make a valid oral will, though well and strong, and not *in extremis*, but only exposed to that general peril which attends all military expeditions. The term “expedition” is not confined to the period of conflict nor to that movement of troops which immediately precedes or brings on the shock of an engagement, and yet wills made in such imminent danger of death ought to be most highly favored; but while encamped in an enemy’s country, surrounded by a hostile population, taking part in operations directed against the foe, and, as one would say, at the seat of war, a soldier is properly deemed in actual military service and capable of making a nuncupative will, although his own present and immediate share in those operations may be at some quiet and remote post, or during a lull in hostilities. For all campaigns involve periods of action and inaction, and in all such service detachments must relieve one another, and points distant or near to the enemy be well covered; and marching orders may arrive at any moment.³

¹ Hays, Goods of, 2 Curt. 338; 1 Wms. Exrs. 118. bard, 8 N. Y. 196; Thompson, *Ex parte*, 4 Bradf. 154. A passenger on a vessel

² 5 Notes Cas. 596; Milligan, Goods of, 2 Rob. 108; 1 Hagg. 51; Parker is of course no “mariner.” Warren v. Harding, 2 R. I. 133.

Re, 2 Sw. & Tr. 375; Hubbard v. Hub-³ See Leathers v. Greenacre, 53 Me.

Courts may well go a step farther, and dropping this word "expedition," construe "actual military service" to mean the active exercise of military functions at times of danger, whether in the enemy's country for aggressive war, or for defence at home, when invasion, insurrection, or riot is to be put down.¹ But on the other hand, while one is quietly quartered in barracks, at home or abroad, performing a sort of routine guard duty, and engaged in no active operations, offensive or defensive, which threaten death and move him towards a scene of danger, he cannot make a valid nuncupative will, as the courts have frequently decided;² nor can he while at home on furlough,³ or near home in the camp where troops are recruited and organized before they are sent to the seat of war;⁴ for at such times he stands in no need of a privilege, but may pursue the prudent formalities imposed upon civilians.⁵ Consequently, under our broad sense of the term "expedition," a soldier may make a nuncupative will while passing from the outer to the inner field of military operations, or from one point to another, or while detailed or detained on the line of march, provided he be in actual service

561, one of the latest cases where this subject is well discussed. "To limit the soldier's privilege," says Barrows, J., "to those excursions from camps or quarters in the enemy's country which are designed to bring on an immediate engagement, would be to defeat it for the most part, except as to mere nuncupations, the proof of which, resting in the breasts of those who are similarly exposed, may never be made available to the soldier's friends." *Ib.* 573. And see 39 Vt. 119. The general danger to which all soldiers are exposed in such a situation, the chances of being suddenly posted elsewhere without good opportunity to arrange one's affairs, not to add other reasons (more forcible in earlier centuries than ours), such as the inconvenience of procuring writing materials in camp suitable for solemn documents, the absence of legal advisers, and the unskilfulness and illiteracy often found among military comrades, all

plead in favor of treating a soldier's informal testament, whether written out or dictated, as genuine, if only established.

¹ See language of *Van Deuzer v. Gordon*, 39 Vt. 111, 118; *Botsford v. Krake*, 1 Abb. Pr. N. S. 112.

² *Drummond v. Parish*, 3 Curt. 522; *White v. Repton*, 3 Curt. 818. See 2 Curt. 341, 368. As to a will made on a tour of inspection, see 1 Robert. 276.

³ *Smith's Will*, 6 Phil. (Pa.) 104.

⁴ *Van Deuzer v. Gordon*, 39 Vt. 111.

⁵ The Roman military testament, whose first sanction came from Julius Cæsar, was limited in like manner to soldiers when in actual service and while they lived in tents. Veterans after dismissal, soldiers out of camp, soldiers not upon an expedition, but living in their own houses or elsewhere, were required to make their testaments like other citizens. *Just. Lib. II. tit. 11; 53 Me. 570.*

and pursuing his orders.¹ (2) The mariner's privilege of nuncupation lies under a different condition: that, namely, of "being at sea"; and the general peril here kept in view, is of a different description, though quite as real as the other, while for similar reasons it may be inconvenient for one to prepare a testament formal in all points as the statute imposes upon those who are safe at home. In legal parlance waters within the ebb and flow of the tide are considered the sea; and hence the mariner may exercise his right of nuncupation while the vessel is on a voyage, and lying at anchor in an arm of the sea,² or while in the tide-waters of a harbor.³ This seems to be the natural limit of the rule; and admiralty law may guide to the conclusion in a case of doubt. But the spirit of this privileged legislation is sometimes invoked as against a literal construction of the phrase "at sea"; and a naval officer living on shore, in his official residence, has been refused the privilege of making a nuncupative will, though occasionally visiting his ship in the harbor;⁴ while the will of a seaman living on board ship, who went on shore upon leave and there met with an accident from which he died before he could return, is held privileged:⁵ and again the fact that a nuncupative will is made by one while on a naval expedition and exposed to the peril of death, has given it peculiar favor, like that accorded to military testaments, and brought it within the spirit of the exception.⁶

¹ *Herbert v. Herbert*, Dea. & Sw. 10; *Thorne's Goods*, 29 Jur. 569. In *Gould v. Safford*, 39 Vt. 498, a soldier fell sick on the line of march and was sent to the hospital, where he died.

² *Hubbard v. Hubbard*, 8 N. Y. 196.

³ *Thompson, Ex parte*, 4 Bradf. 154; 5 Notes Cas. 596. Cf. *Warren v. Harding*, 2 R. I. 133.

⁴ *Easton v. Seymour*, 3 Curt. 530; cited 2 Curt. 339.

⁵ *Lay's Goods*, 2 Curt. 375. In neither of these cases was the will made while the testator was literally "at sea." He was actually on shore.

⁶ *Austen's Goods*, 2 Rob. 611. Here the will allowed was made while conducting an expedition in Chinese waters. The will was made in a river, but whether within tide-waters or not was not shown. But in *Gwin's Will*, 1 Tuck. 44, the nuncupative will of a naval officer made in the war on the Mississippi River near Vicksburg, was refused probate. These cases are in conflict. As a general rule, however, the will of a mariner not in actual service during war, is not made "at sea" if made on a river. See 2 R. I. 133; 3 Curt. 522.

§ 368. **The Same Subject.** — A soldier or mariner who makes a nuncupative will which is invalid because he is not at the time in "actual military service," on the one hand, or "at sea," on the other, may, however, while situated as thus required, give such a will validity by words and conduct tantamount to adopting it as his present will.¹

§ 369. **Points to be considered in Nuncupative Wills; distinguishing Testators Privileged and Unprivileged.** — It now remains to consider the essential points which arise in connection with nuncupative wills. We shall discuss them in the following order: (1) Whether the will must be made *in extremis*; (2) the place of making the will; (3) the manner of declaring one's disposition; (4) the requisite number of witnesses to the will; (5) the subsequent reduction of the will to writing; (6) strictness of proof as to all material facts; (7) whether informal writings may be upheld as nuncupative wills; (8) repeal or alteration of a written will by a nuncupative one.

While dealing with these topics, let us still remember that our legislation, as based upon the Statute of Frauds, justifies a division between privileged and unprivileged testators; those of the former class being singled out from the general range of disposers by nuncupative will, for liberal treatment. The usual privileged class is that of soldiers and mariners under the conditions described in the foregoing sections;² to which the California code adds those expecting death from injury received the same day.³ Wills which bequeathed estate not more than £30 in value were likewise privileged by the Statute of Frauds; and various American codes still pursue a like distinction.⁴ But the privileged class, whether

¹ Van Deuzer *v.* Gordon, 39 Vt. 111.

² *Supra*, §§ 366-368.

³ *Supra*, § 365. And see others under an extreme emergency, who are designated in the codes of some States, *ib.* note. Their status is very slightly considered in the courts. *Carroll v. Bonham*, 42 N. J. Eq. 625.

⁴ See language of Stat. 29 Car. II. § 19, which sets forth its restrictions merely

with reference to wills bequeathing more than £30; leaving only the general restraints of the older common law to operate as to wills of less value. *Supra*, § 363. Some American codes are similarly expressed, requiring nuncupative wills of property beyond a stated amount to be prepared with particular formalities; while others, on the contrary, simply prohibit all nuncupative wills of

composed of soldiers and mariners, or of the testators of petty estates, as the case may be, is now, by the policy of modern England and most of the United States, the only class capable of disposing by nuncupation at all; and this, again, we must keep steadily in view, while investigating the subject.

§ 370. **Whether the Testament must be made in Extremis.**—*First*, then, to inquire whether the will must be made *in extremis*. That this is not essential in the case of the privileged soldier, we have already observed,¹ and the same holds probably true of the privileged mariner; for the one being in “actual military service” and the other “at sea,” a general exposure to sudden death supplies sufficient peril upon which legislation founded its exception. As to the privileged disposer of a petty estate,² a nice question may arise; namely, whether by the law of England, prior to and independently of the Statute of Frauds, all nuncupative wills must be made *in extremis* in order to be valid.³ But, aside from such exceptions, the modern rule as fairly settled is this: that a nuncupative will is not good unless it be made when the testator is *in extremis*. “Last sickness” is the expression used in the Statute of Frauds; and the same words are transplanted in American codes; and by these words should be understood one’s last extremity.⁴

§ 371. **The Same Subject.**—But there appears a discrepancy in the decided cases concerning the pressure of that extremity which shall justify an unprivileged nuncupation. The long train of restrictions imposed by the act of 29 Car. II. evidently discouraged testators from that form of bequests; for Blackstone found it hardly ever heard of by his

property beyond a fixed value. See *supra*, § 365; 3 Jarm. Wills, 755, Randolph’s American note.

¹ *Supra*, § 367.

² Such as the testator under 29 Car. II. § 19, who disposed of an estate not exceeding £30, and was excepted from the express restraints imposed by that act in consequence.

³ Cf. the different opinions expressed in *Prince v. Hazleton*, 20 Johns. 503, where the history of nuncupative wills is traced down from the earliest times.

⁴ *Prince v. Hazleton*, 20 Johns. 503; *Haus v. Palmer*, 21 Penn. St. 296; *Sadler v. Sadler*, 60 Miss. 351; *O’Neill v. O’Neill*, 33 Md. 569. But cf. *Johnson v. Glasscock*, 2 Ala. 239. See § 361.

day, "but in the only instance where favor ought to be shown to it, when the testator is surprised by sudden or violent sickness";¹ nor do the English reports furnish a single valuable comment upon a point which, as legislation now stands in that country, can never arise again.² In this country, however, the question of extremity has been discussed in several cases. As Chancellor Kent held, and the court decided in *Prince v. Hazleton*, the extremity or last sickness must be such that the party speaking then is overtaken by so sudden and violent a sickness, or at least utters his wishes so shortly before death, that there was afforded thereafter no convenient time or opportunity to have reduced his words to writing and executed a formal will.³ It would follow that if the testator recover, even when he has made a nuncupative will with due formality, it becomes of no force;⁴ and even though a lingering sickness proved his last, yet if his mental and physical condition afforded an ample opportunity and inducement to prepare and execute a written will, after his nuncupation occurred, the spoken words could not operate as those of a "last sickness." This justifies the policy of the Statute of Frauds, which, by the better opinion, meant to deal strictly with all non-privileged cases, and only tolerated

¹ 2 Bl. Com. 501. In stating the essentials of a nuncupative will, this writer states further: "To prevent impositions from strangers, it must be in his last sickness; for if he recovers, he may alter his dispositions, and has time to make a written will." *Ib.*

² One instance is reported where a nuncupative will was established in 1753 under the Statute of Frauds. A wagoner was injured so badly that he died the next day. He made his oral will while lying disabled and *in extremis*. A simple decision by the court upon the facts given in testimony is preserved. *Freeman v. Freeman*, 1 Cas. temp. Lee, 343. See circumstances in *Jackson v. Bennett*, 2 Phillim. 90, which case, however, decides nothing in point.

³ *Prince v. Hazleton*, 20 Johns. 502.

This view is adopted in Pennsylvania. *Yarnall's Will*, 4 Rawle, 46; *Haus v. Palmer*, 21 Penn. St. 296. And in Maryland. *O'Neill v. O'Neill*, 33 Md. 569. In *O'Neill v. O'Neill* the oral disposition alleged was made on the day immediately before the testator's death. But the testator had been an invalid for fifteen years, and had been for eight months previous to his death confined to his house, gradually yielding to consumption; his physician had admonished him that recovery was hopeless; he lived in a populous city and with ample opportunity to prepare a written will; and for a day at least after the nuncupation he lived, retaining the full possession of his senses to the hour of his death. The nuncupative will was accordingly disallowed.

⁴ *Cases supra*.

these nuncupative wills under the stress of a supposed necessity. Though the lingering disease should prove finally fatal, it must come to the last stage of extremity, if not to the last day or hour, in order to be a "last sickness" within the statute; and even here nuncupation may be prejudiced by the neglect to prepare in good season a written will in view of certain death.

A more liberal rule is announced by the supreme court of Alabama: namely, that if the words are spoken in the sickness of which one dies, and under a sense of approaching death, it may suffice, even though the party lived long enough after the nuncupation to afford a fair opportunity for reducing his desires to the more permanent form of a written and executed will.¹ But such latitude is dangerous; and while the circumstances in every such case deserve a fair consideration, the preferable rule is the former.² And accordingly in a recent New Jersey case, where the decedent lived nine days after making a verbal will, possessing the capacity and having fair opportunity to execute a written one, the nuncupation was treated as of no effect; for wills of that description (except as to the soldiers and mariners already mentioned) could be justified only by sheer necessity.³

§ 372. **The Place of Making the Will.** — *Second*, as to the place of making the nuncupative will. The common law makes no restriction in this respect for one kind of testament more than another. But under the Statute of Frauds nuncupative wills of the non-privileged sort can only be made in one's dwelling, unless the testator is surprised or taken sick while absent and dies before his return.⁴ Our local code at

¹ *Johnson v. Glasscock*, 2 Ala. 239. In this case the testator's disease assumed a serious character about fourteen days before he died. About ten days before he died the will was made. The testator, it was conceded, knew how to write, and there was ample opportunity to execute a written will after this nuncupation. The witnesses reduced his wishes to writing soon after he died.

² See *Sadler v. Sadler*, 60 Miss. 251,

which intimates that the concrete facts of each case should be weighed, but announces no positive opinion.

³ *Carroll v. Bonham*, 42, N. J. Eq. 625. Here the decedent, a woman, appears to have had an impression that her verbal will, whenever made, would be good. See also *Scaife v. Emmons*, 84 Ga. 619.

⁴ Act 29 Car. II. § 19; *supra*, § 363. See *Marks v. Bryant*, 4 Hen. & M. 91;

the present day must determine whether any such restraints still operate. From this limitation the wills of soldiers and mariners were of course exempt, not without some such restraint of their own from the nature of the case;¹ nor were wills of petty amount made subject to the rule.²

§ 373. **The Manner of Declaring One's Disposition.** — *Third*, as to the manner of declaring one's disposition, or what we may term the nuncupation. The Statute of Frauds expressly enacts, that the testator shall, at the time of pronouncing his will, bid the persons present or some of them bear witness that such was his will, or to that effect.³ This is technically called the *rogatio testium*; and the statute requirement, whose policy plainly is to establish testamentary intent so clearly that bystanders may not frame a will out of words loosely spoken by the dying person, has been strictly construed. Thus, where a mother in her last sickness called to her bedside several of her children and the daughter of the person with whom she lodged, and declared how she wished her effects disposed of and her family brought up after her death, the declaration was held insufficient, for want of the solemn *rogatio testium*; she ought to have bade those present bear witness that this was her will.⁴ A dying person may give many farewell messages, may express many farewell wishes, often changing his mind, adding or substituting as new ideas occur; but to constitute the oral will, he must have concluded its substance in his own mind, and, gathering up his faculties, he must set forth clearly before the witnesses what shall be this disposition once and for all, and so give

Nowlin v. Scott, 10 Gratt. 64. In the Virginia statute "habitation" is used (in the sense, however, of "dwelling-house"), and there are other verbal variations from the expression of the Statute of Frauds.

¹ *Supra*, § 367.

² Act 29 Car. II. § 19.

³ *Ib.*

⁴ Bennett v. Jackson, 2 Phillim. 190. And see Cas. temp. Lee, 588; Hebden's

Will, 20 N. J. Eq. 473; Dockrum v. Robinson, 26 N. H. 372. Nor can the statement of a sick person before those in the room, that she wants A to have her property, be probated as her nuncupative will, if she neither mentions a will nor calls on any one present to note her language. Broach v. Sing, 57 Miss. 115. And see Bundrick v. Haygood, 106 N. C. 468.

point to the transaction as an ideal execution of his will on the spot, including a request for their ideal attestation thereof.

Independently of such legislation, and prior to the statute of Charles II., very nearly the same *rogatio testium* appears to have been indispensable at our law; for though no precise form of words was prescribed, the alleged nuncupation must have disclosed a present consistent intention that the very words uttered should constitute one's will, and that the witnesses should understand the dying person in that sense and mark his words accordingly. This nuncupation on his part manifested a testamentary intent, whether one used the word "will" or "testament," or not.¹ In this aspect, then, our privileged classes of testators appear to have no substantial advantage over others; except it be in dispensing with the more formal declaration of the statute where other circumstances sufficiently establish that nuncupation and a last will were in fact intended;² or perhaps where the will is founded upon letters, an unperfected instrument in writing, or other proof not purely oral.³ But military testaments were always treated with singular indulgence; and the same indulgence may possibly extend to mariners at sea.⁴

¹ Swinburne says that the testator "doth declare his will" (his whole mind, etc.) "before a sufficient number of witnesses." Swinb. pt. 4, § 29; pt. 1, § 12. Perkins says that the testator prays those about him to bear witness of his last will and declares by word what is his will. Perk. § 476. See those early authors cited *supra*, § 361.

² It appears, however, that at common law a nuncupative will may be made not only by the proper motion of the testator, but also at the interrogation of another. Swinb. pt. 1, § 12, pl. 6; 1 Wms. Exrs. 122.

³ Of such wills adduced in probate as nuncupative, etc., we shall speak presently in this chapter.

⁴ A military testament may be good, though made up of declarations and requests not strictly in the form of a sin-

gle nuncupation with a *rogatio testium*. See Gould v. Safford, 39 Vt. 498. The civil law was very indulgent in respect to wills of soldiers, and if a soldier wrote anything in bloody letters on his shield, or in the dust of the field with his sword, it was held a good military testament. 1 Bl. Com. 417. No particular formalities were necessary to the validity of such a disposition. According to Swinburne, only those solemnities were necessary which are *juris gentium*; no precise form of words was required, and it was not material whether the testator spoke properly or improperly if his meaning appeared; and soldiers are clearly acquitted from observing the solemnities of the civil law in the making of their testaments. Swinb. pt. 1, § 14, pt. 4, § 26.

§ 374. **The Same Subject.**—As to wills, therefore, which derive no privilege beyond that accorded to a nuncupation for establishing them, it should appear that the deceased, at the time of speaking the alleged words, had the present testamentary purpose and meant that those words should constitute the final expression of that purpose.¹ He should have a sufficient number of witnesses present together and call upon them at the same time to bear witness to his will as he pronounces it, or use language equivalent;² nor is it enough that he declares his will to these witnesses separately and apart from one another.³ Nor should the will be constituted by words drawn out from the dying man by some interested party present; but the testament should appear to come freely and spontaneously from the dying man's own breast.⁴

§ 375. **The Requisite Number of Witnesses to the Will.**—*Fourth*, as to the number of witnesses who are required to prove the will. The Statute of Frauds declared that no nuncupative will should be good that was not "proved by the oath of three witnesses"; and so strictly has this provision been construed, that where one of the three witnesses present at a certain nuncupation died before he could make proof, the will was held to be invalid.⁵ So should these three witnesses be in substantial accord as to what the will of the deceased really was.⁶ Among American States which still permit nuncupative wills to be made by non-privileged persons,

¹ Verbal instructions and directions for drawing up a written will do not constitute a nuncupative will although spoken in presence of the proper number of witnesses. *Dockum v. Robinson*, 26 N. H. 372. And see 3 *Leigh*, 140; *Reese v. Hawthorn*, 10 *Gratt.* 548; *Hebden's Will*, 20 N. J. Eq. 473.

² *Hebden's Will*, *supra*; 1 *Add.* 389; *Brown v. Brown*, 2 *Murph.* 350; *Ridley v. Coleman*, 1 *Sneed*, 616; *Arnett v. Arnett*, 27 *Ill.* 247.

³ *Prince v. Hazleton*, 20 *Johns.* 505; *Weeden v. Bartlett*, 6 *Munf.* 123; *Tally v. Butterworth*, 10 *Yerg.* 501; *Offut v. Offut*, 3 *B. Mon.* 162; *Yarnall's Will*, 4

Rawle, 46; *Wester v. Wester*, 5 *Jones L.* 95. The *rogatio testium* is indispensable. *Portman v. Hunter*, 6 *B. Mon.* 538, construes the Kentucky statute less strictly, but, as precedents go, contrary to rule.

⁴ *Cf. Brown v. Brown*, 2 *Murph.* 350; *Parsons v. Parsons*, 2 *Greenl.* 298. The peculiarities of the Louisiana code with reference to nuncupative wills have already been noted. *Supra*, § 365.

⁵ 1 *Eq. Cas. Abr.* 404; 1 *Wms. Exrs.* 121.

⁶ *Mitchell v. Vickers*, 20 *Tex.* 377, *Bolles v. Harris*, 34 *Ohio St.* 38.

some require three witnesses; but commonly two witnesses may suffice.¹ A statement before less than the requisite number of witnesses does not constitute a valid nuncupation.²

Nuncupative wills of the privileged kind — those of soldiers, and mariners, and the wills of petty amount — the Statute of Frauds leaves without any definite number of witnesses to establish them. Such wills, it would appear, may, aside from legislation to the contrary, be proved in a court controlled by common-law rules upon the testimony of a single unimpeached, competent witness.³ But no one is a suitable witness for a nuncupative will unless competent as in other testamentary causes.⁴

§ 376. **Subsequent Reduction of the Nuncupative Will to Writing.** — *Fifth*, as to the subsequent reduction of the will to writing. The Statute of Frauds required the nuncupative words to be put into writing within six days after they were spoken; as otherwise the alleged will could not be proved after six months.⁵ Similar legislation (with slight variation as to the number of days) may be found in the United States; and where the words reduced to writing are not substan-

¹ See 1 Jarm. 98, Bigelow's note; 3 Jarm. 755, Randolph's Am. note; Stimson's Am. Stat. Law, § 2703. Maine, New Hampshire, New Jersey, Maryland, Texas and Wisconsin are among the States whose codes require three witnesses. In most of our northwestern States and those on the Pacific slope, besides Pennsylvania, Kentucky, Tennessee and Mississippi, the code provides for two witnesses instead. In Ohio the rule of competency and disinterestedness is more strongly insisted upon, under the statute, than in the case of written wills. *Vrooman v. Powers*, 41 Ohio St. 191; *supra*, §§ 353-358.

² *Bundrick v. Haygood*, 106 N. C. 468; 41 Ohio St. 191; 84 Ga. 619.

³ *Gould v. Safford*, 39 Vt. 498, where this rule was applied in favor of the nuncupative will of a soldier in actual service. Under the rules of the civil

law a controverted fact had to be established by the testimony of at least two witnesses; but under the rules of the common law, the testimony of a single witness, where there is no ground for suspecting either his ability or his integrity, is a sufficient legal ground for belief, even in criminal cases. *Ib.* 505.

⁴ *Supra*, § 350; *Haus v. Palmer*, 21 Penn. St. 296.

⁵ Stat. 29 Car. II. § 19. By § 21, as we have seen, no nuncupative will could be admitted to probate without at least fourteen days' delay from the testator's death and a citation of the widow and next of kin. "It [the nuncupative will] must not be proved at too long a distance from the testator's death, lest the words should escape the memory of the witnesses; nor yet too hastily, and without notice, lest the family of the testator should be put to inconvenience or surprised." 2 Bl. Com. 501.

tially the same as spoken, the will may be pronounced invalid.¹ This safeguard against fraud and failure of recollection applies in strictness, however, only to the non-privileged wills; and for those of the privileged kind, we may assume that the usual common-law rules of evidence are applicable to prove or disprove them.²

§ 377. **Strictness of Proof as to all Material Facts.** — *Sixth*, as to strictness in establishing all the facts material to the probate. Nuncupative wills, being as a rule no favorites of the court, demand strictness of proof on all essential points, whether for the purpose of showing that the statute restraints have been fully complied with, or to establish facts fundamentally indispensable to the probate, independently of statute restraints. For, with or without a Statute of Frauds, evidence more strict and stringent than in the case of a written will should be furnished in every particular. "This," observes Williams, "is requisite in consideration of the facilities with which frauds in setting up nuncupative wills are obviously attended; facilities which absolutely require to be counteracted by courts insisting on the strictest proof as to the facts of such alleged wills. Hence the testamentary capacity of the deceased, and the *animus testandi* at the time of the alleged nuncupation must appear, in the case of a nuncupative will, by the clearest and most indisputable testimony."³

The general impolicy of nuncupative wills is not, however, asserted as strenuously in some States as in others; while some of the privileged classes, soldiers in actual service more particularly, appear to be regarded with positive favor and indulgence.

§ 378. **Informal Writings, whether upheld as Nuncupative Wills.** — *Seventh*, as to whether informal writings may ever

¹ Bolles v. Harris, 34 Ohio St. 38. in the preceding sections. See also And see Mitchell v. Vickers, 20 Tex. Smith v. Thurman, 2 Heisk. 110; Bolles v. Harris, 34 Ohio St. 38; Mitchell v. Haygood's Will, 101 N. C. 574.

² Gould v. Safford, 39 Vt. 505.

³ Wms. Exrs. 121, 122; 1 Add. 389, Ohio St. 191; 106 N. C. 468. For the Louisiana practice see *supra*, § 365.

be upheld as nuncupative wills. We have seen that until such enactments as the Statute of Victoria came in force, holograph letters, unattested writings, and even mere memoranda, were allowed a very loose operation as wills of personal property. Thus was it, in fact, long after the Statute of Frauds restrained nuncupative wills.¹ In various American States where these unattested writings have been laid under the ban, courts show a disposition to sustain unperfected wills in writing as nuncupative wills; as where, for instance, the completion of the will was prevented by act of God.² But this is a straining of the statute; for a nuncupative will, as its literal meaning imports, is simply a verbal declaration made in presence of witnesses called upon to notice it, and not reduced to writing by the testator's direction; the verbal declaration being intended as his will, and not as something different or preliminary to it; and thus do the more consistent authorities rule it.³

But privileged wills, and especially military testaments, may stand on a more favored footing in this respect; not because the will which is written down by the testator instead of being uttered is strictly of the nuncupative kind, but because the civil law dispensed freely with formalities in such testaments, and the common law is supposed to intend the same. Defective instruments in writing, letters in his own hand, declarations which some comrade is to write out and transmit by mail, and the like, have accordingly been

¹ See *supra*, § 253. In England until the Statute of Victoria, which abolished nuncupative wills of non-privileged persons, on the one hand, and written wills of personal property informally attested, on the other, an actual testamentary disposition, which had been committed to writing by authority of the testator, with intention to execute, but was left unsigned or unattested by accident or the act of God, might be admitted to probate: but the probate was not that of a nuncupative will, nor did any of the restraints upon nuncupative wills obstruct them. *Huntingdon v. Hunting-*

don, 2 Phillim. 213; *Strish v. Pelham*, 2 Vern. 647. So has it been in American States upon a like theory, prior to the passage of local statutes which make a formal execution and attestation necessary. *Public Administrator v. Watts*, 1 Paige, 373; 4 Wend. 168.

² *Offut v. Offut*, 3 B. Mon. 162; *Boofter v. Rogers*, 9 Gill, 44.

³ *Hebden's Will*, 20 N. J. Eq. 473; *Dockrum v. Robinson*, 26 N. H. 372; *Porter's Appeal*, 10 Penn. St. 254. Nor can a will executed as a written will, and defective in respect of execution, be set up as a nuncupative testament. *Rees*

upheld as suitable soldier's testaments, within the exception of our statutes relating to nuncupative wills, though no *rogatio testium* took place at all.¹

§ 379. **Repeal or Alteration of a Written Will by a Nuncupative One.** — *Eighth*, as to the repeal or alteration of a written will by a nuncupative one. This, we have seen, is expressly forbidden by the Statute of Frauds.² And under American codes, the revocation, total or partial, of a duly executed written will by an oral or nuncupative one is likewise prohibited.³

v. Hawthorn, 10 Gratt. 548. A signed writing is not a nuncupative will. *Stamper v. Hooks*, 22 Geo. 603.

¹ *Gould v. Safford*, 39 Vt. 498; *Van Deuzer v. Gordon*, ib. 111; *Leathers v. Greenacre*, 53 Me. 561; *Botsford v. Krake*, 1 Abb. Pr. N. S. 112.

We should observe the specific language of such enactments: not that soldiers in actual service and mariners at sea may simply make a nuncupative will, but that they may dispose, etc., *in the same manner as before the act*; which expression may well embrace all the means of disposing of personal property which the common law sanc-

tioned. As to wills of petty amount, however, the local legislation, properly construed, may be found to permit of them only on the strict footing of "nuncupative wills," and not by way of letter or writing informally executed.

² Stat. 29 Car. II. § 22. But it has been held that this section does not prevent a nuncupative provision (made according to the statute restrictions) of a lapsed legacy. *T. Raym.* 334; *Com. Dig. Devise C*; 1 *Wms. Exrs.* 122. See § 363, *supra*.

³ *McCune v. House*, 8 Ohio, 144; *Brook v. Chappell*, 34 Wis. 405. See Part IV. *post*, as to Revocation, etc.

PART IV.

REVOCATION, ALTERATION, AND REPUBLICATION OF WILLS.

CHAPTER I.

REVOCATION OF WILLS.

§ 380. **Various Modes of Revocation; Modern Legislation affects the Subject.** — There are various modes by which a will once executed may be revoked during the testator's lifetime; the fundamental principle being that every will (being in the nature of a gift or donation) is ambulatory until the testator dies, and may meanwhile be superseded, altered, or simply set aside whenever by his own free and rational act suitably expressed the testator manifests a corresponding intention, or so changes his circumstances and state in life that the law must infer that intent out of justice to his new condition.¹ Hence we may consider revocation under two distinct leading aspects: (1) revocation by the testator's direct act; (2) revocation by inference of law, from acts or conduct of the testator not direct.² Under the former head may be considered the effect of actually cancelling, destroying, or obliterating the will; also of making a later will or codicil inconsistent with the former; also of expressly revoking by such later will or codicil or by some other writing; all sufficient acts of direct revocation, in fact, whether by parol or writing, being here

¹ As to wills not strictly revocable because of mutual consideration, see Joint and Mutual Wills, Part V. *post.*

² Under the Louisiana Code, following the civil law provisions, the revocation of testaments is stated to be ex-

press or tacit, — it is general, furthermore, when all the dispositions of the testament are revoked, and particular when it falls upon one or more of the dispositions without touching the rest. La Code, § 1691.

included. Under the latter head we consider more especially the effect of subsequent marriage and the birth of a child, or of marriage alone.

There are important provisions bearing on this subject in the Statute of Frauds, which our modern codes, English and American, preserve and extend, with a view of reducing the compass of loose and uncertain testimony under this head as much as possible. Instruments which at this day must be made with such solemn formalities are revocable in modern policy only by acts equally solemn and positive, or nearly so; in order that testamentary intent or a change of testamentary intent may be clearly evinced at the probate, and the main conclusion arrived at (which after all is the material one) what was the latest rational disposition of his estate, intended by the decedent, and duly expressed as the law requires, if he meant to die testate at all. For his earlier purposes, his earlier dispositions, are of no direct consequence in the probate; it is the latest disposition or dispositions, as a consistent whole, — the latest legally executed testamentary scheme, — or that alternative and substitute, the public scheme for intestacy, by which his estate must be settled and his property descend and be distributed.

§ 381. **The Same Subject.** — The English Statute of Frauds, as we have already seen, conformed to Lord Nottingham's wishes, in providing that no written will should be repealed or altered by any words or will by word of mouth; that is to say, by testament merely nuncupative.¹ The sixth section of this celebrated act was still more explicit, in discountenancing doubtful revocations, so far as related to devises of land. That section declared that no devise in writing of land, etc., nor any clause thereof, should be revocable otherwise than by some other will or codicil in writing, or other writing declaring the same, or by burning, cancelling, tearing or obliterating the same by the testator himself, or in his presence and by his directions and consent; but all devises and bequests

¹ *Supra*, § 379; Act 29 Charles II. nuncupative will. *McCune v. House*, (1676-77), § 22. A duly executed will cannot be revoked by a

of land, etc., should remain and continue in force until the same were burnt, cancelled, torn or obliterated by the testator or his directions in manner aforesaid, or unless the same were altered by some other will or codicil in writing, or other writing of the deviser, signed in the presence of three or four witnesses declaring the same.¹ The effect of this enactment was to demand on the testator's part either one of those plain and palpable acts which naturally signifies a changed intention, like burning, cancelling, etc., the instrument itself, and which requires no witness, because the act itself takes away or discredits proof of the will; or, instead, some other instrument in writing executed with all the formalities of the original one.

At the time of this enactment, and by virtue of its provisions, no wills required an attestation except devises of lands.² But when the legislature prescribed for wills of personal property, for all wills in fact, the same solemn execution by the testator and a stated number of witnesses, the rule of written revocation conformed to the new policy. Under the English act of 1 Vict. c. 26, § 20, it is declared accordingly, that no will shall be revoked but by another will or codicil, or by some writing executed like a will, or else by destroying the same.³ In the United States, we may add, the same policy has been quite generally favored; and provisions of this character, based in language upon the English Statute of Frauds but extended to wills of all kinds, are common to our legislation in every quarter of the land.⁴ We are to observe, however, that, as the language of the later English enactments reduces the scope of informal and inexplicit revocation

¹ Act 29 Charles II. § 6.

² See *supra*, § 253.

³ Act 1 Vict. 26, § 20. For the precise language used, see Appendix, *post*.

⁴ Kent Com. 520, 521, and citations. As to the several American codes on this subject, see Stimson's Am. Stat. Law, § 2672. In nearly all the United States it is expressly provided that no will, devise in a will, or codicil, can be revoked except by the burning, tearing,

cancelling, destroying, or obliterating of the instrument. And this must be done by the testator; or, as most of our State legislatures provide, by some other person, in his presence, or by his direction. Some local varieties of language will be found. *Ib.*

Where a statute prescribes the mode by which a will may be revoked, evidence of its revocation by any other mode is inadmissible. 81 Ala. 418.

once so liberally permitted, so does American legislation tend at this day, in the same direction, while codes differ, nevertheless, in fixing the standard and use terms more or less comprehensive to denote it.¹ Revocation by the testator's direct act is what these codes, English and American, seek to circumscribe; for, as we shall see, that revocation which the law implies from a changed condition in the testator's condition and circumstances, marriage more especially, is still a feature of our law.² And the testator's direct act of revocation ought in all cases to be accompanied with the intention to revoke.

§ 382. **Oral or Implied Revocation not recognized.**—A written testament, then, cannot be revoked in modern practice by mere words of oral revocation, however emphatic of expression or intended to take absolute effect.³ Still less can wills be made or revoked by legal implication from outward tokens of a decedent's personal feelings towards those concerned in his estate;⁴ or by mere manifestations of an

¹ The Massachusetts statute, for instance, declares: "No will shall be revoked unless by the burning, tearing, cancelling, or obliterating of the same, with the intention of revoking it, by the testator himself, or by some person in his presence and by his direction; or by some other writing, signed, attested, and subscribed in the same manner that is required in the case of a will; but nothing contained in this section shall prevent the revocation implied by law from subsequent changes in the condition or circumstances of the testator." Mass. Pub. Stats. (1882) c. 127, § 8. *Cf.* the precise language used in other American enactments upon this same subject.

² Stat. 1 Vict. c. 26, §§ 18, 20, expressly provides for revocation by subsequent marriage. The Massachusetts statute, *supra*, is seen to reserve revocations implied by law. Other instances from the codes might be cited. The main point of modern interest is whether marriage alone revokes as to both sexes, without the birth of a child.

³ *Supra*, § 381; *Hylton v. Hylton*, 1 Gratt. 161; *Perjue v. Perjue*, 4 Iowa, 520; *Jackson v. Kniffen*, 2 Johns. 31; 2 Yeates, 170; *Kent v. Mahaffey*, 10 Ohio St. 204; *Wittman v. Goodhand*, 26 Md. 95; *Jones v. Moseley*, 40 Miss. 261; *Slaughter v. Stephens*, 81 Ala. 418. Before the Statute of Frauds there might be parol revocation. *Cro. Jac.* 497. And see 5 Conn. 164.

A testator went to his executor, took the will from his custody, and showed the envelope containing it to his wife, telling her that it was good for nothing and was to be destroyed. After his death, the instrument was found uncanceled in a bureau drawer which contained various waste papers. It was held that the will had never been properly revoked. *Goodsell's Appeal*, 55 Conn. 171.

⁴ Not even where the testator disinherited his son by will, and afterwards became reconciled to him, can revocation of the will be implied. It is for the testator to perform the efficient act; the

intention to make a different disposition at some future time.¹

§ 383. **Revocation by Burning, Tearing, Cancelling, Obliterating, etc.** — Our investigation leads us, then, to compare the language of local enactments, from the time of Charles II., not expressed with uniform favor, as to revocation by direct act of the testator. And first, as to burning, cancelling, tearing, obliterating, and the like, with suitable intention. "Burning, cancelling, tearing, or obliterating" is the language for which the Statute of Frauds sets the copy.² "Burning, tearing, or otherwise destroying" are the words of the Wills Act of Victoria, suggesting a narrower construction, but applicable more universally to wills, whatever the kind of property.³ Each American code employs its own terms, but generally some or all of the above.

Such are the modes to which one is confined who seeks to revoke by what he does to the will itself. It is obvious that utterly destroying the instrument so as to leave nothing which may ever be produced in evidence again is one method here contemplated, and the more favored if not the only favored one; and that the other method consists in leaving the instrument so cancelled or obliterated that an intent to revoke may well be inferred from its appearance. Certainly, if one means to revoke, it is his best course to burn or tear up his will, so that no scrap of it shall remain behind him; for otherwise, with all his pains, he tempts those who are shown what was given them, and then cut off, to conjure up doubts whether he really cancelled, and thus plunge the estate into a doubtful contest.

§ 384. **The Same Subject: the Intention to revoke must accompany the Act.** — Whatever the means thus employed for defacing or destroying the will, a free and rational intention to revoke must accompany the act on the testator's part, or

law cannot do it for him. *Jones v. Moseley*, 40 Miss. 261. But the act of cancelling or disposing may be explained in the light of the testator's feelings where the act is in doubt.

¹ *Rife's Appeal*, 110 Penn. St. 232.

² Stat. Charles II. § 6.

³ Stat. 1 Vict. c. 26, § 20.

the revocation will not be valid. Thus, to use Lord Mansfield's illustration, if a man were to throw ink upon his will instead of sand, there would be no revocation of the will although the writing were irrecoverably gone;¹ nor, we may add, would exposure of the will to destruction or defacement by insects, mice, acids, fire or water, through mere heedlessness, have this effect; and of course injury to the paper or its loss by act of God, or from any cause external and proximate without the testator's due sanction, constitutes no legal revocation. Or supposing a man having two wills of different date before him, should direct the former to be destroyed and by mistake the latter is cancelled.² No revocation can be good which is procured by fraud or palpable error, or where the testator was unduly influenced to commit the act;³ and it is clearly settled that the revocation of a will while the testator is insane is no less void than the making of a will;⁴ because it requires the same capacity to revoke a will as to make one, and one cannot intend to destroy, in a legal sense, unless his mind acts rationally and to the point.⁵

Statutes frequently express the idea that the revocation of a will must be done "with the intention of revoking the same."⁶ Such expression is not, however, necessary; for it was long ago settled, upon construction of the Statute of

¹ *Burtenshaw v. Gilbert*, Cowp. 52.

² Cowp. 52; *Onions v. Tyrer*, 1 P. Wms. 345; *Burns v. Burns*, 4 S. & R. 295. Even where the will is torn up, under a mistaken impression that it is invalid, and then gathered up and preserved, it will remain in force. *Giles v. Warren*, L. R. 2 P. & D. 401.

³ *Supra*, Part II. c. 10; *O'Neill v. Farr*, 1 Rich. (S. C.) 80; 1 Pick. 546, 547; *Rich v. Gilkey*, 73 Me. 595; *Batton v. Watson*, 13 Geo. 63. And see § 427 a.

⁴ *Harris v. Berrall*, 1 Sw. & Tr. 153; *Scruby v. Fordham*, 1 Add. 74; *supra*, Part II.; *Benson v. Benson*, L. R. 1 P. & D. 608; 3 Hagg. 754; *Smithwick v. Jordan*, 15 Mass. 115; *Forman's Will*, 1 Tuck. (N. Y.) 205; 4 Barb. 28; *Allison*

v. Allison, 7 Dana, 94; *Brunt v. Brunt*, L. R. 3 P. & D. 37; *Rhodes v. Vinson*, 9 Gill, 169; *Ford v. Ford*, 7 Humph. 92; *Rich v. Gilkey*, 73 Me. 595, and cases cited; *Johnson's Will*, 40 Conn. 587.

⁵ No revocation is implied where none was intended. See *Birks v. Birks*, 34 L. J. 90. Where a testator, soon after executing his will, being doubtful whether he had signed his surname rightly, caused it to be erased, and signed his full surname in the presence of two other attesting witnesses, this was held no revocation. *Frear v. Williams*, 7 Baxt. 550.

⁶ Stat. 1 Vict. c. 26, § 20; Mass. Pub. Stats. (1882) c. 127, § 8; *Stimson Am. Stat. Law*, § 2672.

Frauds, which used no language of the sort, that an act done without the mental intention to revoke was wholly ineffectual.¹ In short, the physical act itself is not conclusive, but open to explanation.

§ 385. **Will destroyed, etc., unintentionally, to be established as it existed.** — It follows that if a will were duly executed by a testator while of sound mind and acting freely, and afterwards destroyed by him or some one else, without the free and rational *animus revocandi* on the testator's part, such will may be established in probate on secondary proof of its contents;² and a like rule applies to lost or missing wills. But the presumption arises, that the will under such circumstances was intentionally revoked by the testator while he lived and was competent to revoke, and this presumption must first be overcome.³ Even where a testator tears up his will or codicil under the mistaken impression that he has not properly executed it, and orders a new and similar writing made out, but dies before executing it, the torn instrument is admissible to probate on the ground that an intent to revoke was wanting.⁴

§ 386. **Effect of Intention to revoke where the Act does not correspond.** — On the other hand, if the maker of a will, intending to revoke it, destroys a paper which he is fraudulently induced to believe is the identical instrument when it is not, and continues in the belief that his will has been revoked, never again recognizing it nor knowing of its existence, this has been held a legal revocation.⁵ Particularly does this hold true of a testator whose infirmity makes him dependent upon those about him by whom his confidence is abused; and the sufficient act being applied to the wrong paper, the intent operates legally upon the true one.⁶ But

¹ 1 Wms. Exrs. 147; Clarkson v. Barb. 119. And see Birks v. Birks, 34 Clarkson, 2 Sw. & Tr. 497; Gow. 186; L. J. 90.

Jackson v. Holloway, 7 Johns. 394.

² Scruby v. Fordham, 1 Add. 74;

Brand Re, 3 Hagg. 754; Batton v. Watson, 13 Geo. 63; Voorhis v. Voorhis, 50

³ See § 402, *post*.

⁴ Thornton's Goods, 14 P. D. 82.

⁵ Smiley v. Gambill, 2 Head. 164.

⁶ Pryor v. Coggin, 17 Ga. 444; Hise

where the infirm testator directs some one else to destroy, and nothing is destroyed at all, no sufficient act appears upon which the court can fasten the intent to revoke; and his supposition that the direction was obeyed avails nothing.¹

Whether the testator's bare mistake, however, not induced by the fraud of others, can cause a paper to be revoked which he did not actually revoke, may well be doubted; as if one should carelessly burn up some letter by himself, supposing it his will, and die without discovering his error. For it is straining a rule, out of regard to justice, to detach the intent from the act: the general maxim being, that no intention to revoke can constitute a legal revocation unless the sufficient statute act accompany it.²

So, too, courts have not felt justified in setting a will aside on the plea that the undue influence of others prevented the testator from revoking it when he desired to;³ though possibly they would in a heinous case, whether of coercion or fraud. And it should be borne in mind, moreover, that one may ratify, republish, or keep in force the will which he once meant to revoke but did not, by his own active or passive conduct after the coercion is removed or the fraud or mistake discovered;⁴ for if one's purpose is to revoke, he should pursue that purpose consistently to the end.

§ 387. Burning, Cancelling, etc., must be by Testator himself, or under his Direction, etc.—Inasmuch as revocation involves intention, the inference arises that the physical act must be performed by the testator himself or under his sanction and direction. Nor is legislation silent on this point: for the Statute of Frauds expressly requires the burning, cancelling, tearing, or obliterating to be done “by the testator himself, or in his presence and by his directions and

v. Fincher, 10 Ired. 139; *Blanchard v. Blanchard*, 32 Vt. 62.

¹ *Malone v. Hobbs*, 1 Rob. 346; 3 Leigh, 32; *Runkle v. Gates*, 11 Ind. 95; *Mundy v. Mundy*, 15 N. J. Eq. 290; *McBride v. McBride*, 26 Gratt. 476. And see next section.

² See *Delafield v. Parish*, 1 Redf. 1;

25 N. Y. 9; *Blanchard v. Blanchard*, 32 Vt. 62; cases *post*.

³ *Floyd v. Floyd*, 3 Strobb. 44; *Smith v. Fenner*, 1 Gall. 170.

⁴ *Taylor v. Kelley*, 31 Ala. 54; *Lamb v. Girtman*, 26 Geo. 625; *O'Neill v. Farr*, 1 Rich. 80.

consent";¹ and the substance, if not the phrase, of this requirement appears in later enactments, English and American.² Both presence and direction of the testator being thus essential where the act is performed by another, a will is not legally revoked, though destroyed by the testator's own order, if burned or torn where he did not or could not see or take cognizance of the deed done.³

Destruction of the instrument, then, by a third party without the testator's permission or knowledge, whether before or after his death, would be an invalid, if not a criminal act.⁴ Ratification by the testator of such a destruction is not readily to be inferred.⁵ On the other hand, no fraud is committed by any person in destroying or assisting to destroy a will by the genuine express direction and in the presence of the testator, though apart from all others; for every testator has the right, while in the full possession of his faculties and acting freely, to destroy his own will at any time or in any manner he pleases, be it secretly or openly.⁶

If a person, confided in, disobeys the testator's direction, though deceitfully, and preserves the will intact, no legal revocation takes place, for nothing is destroyed or cancelled.⁷ But deceit and disobedience to the extent of destroying a paper artfully substituted for the will in question in the testator's presence and with all the precision required by law may operate differently; and the testator, remaining ignorant of the fraud and free from fault on his own part, the legal act done to the wrong paper has been treated as though done to

¹ *Supra*, § 381.

² *Ibid.*

³ Dadd, Goods of, Dea. & Sw. 290; Dower v. Seeds, 28 W. Va. 113.

⁴ Haines v. Haines, 2 Vern. 441; Bennett v. Sherrod, 3 Ired. 303. See New York code, which treats such acts as "fraudulent." Early v. Early, 5 Redf. 376. A testator cannot delegate his power of revoking a will by inserting in it a clause which confers on another an authority to destroy it after his death. The effect of such destruction would be, to permit the contents of

the will to be established by secondary proof. North *Re*, 6 Jur. 564; 1 Robertson. 661.

⁵ Mills v. Millward, 15 P. D. 20. *Quære* whether ratification under such circumstances would constitute a legal revocation within the statute. *Ib.*

⁶ Timon v. Claffy, 45 Barb. 438; § 388. ⁷ *Supra*, § 386; Hylton v. Hylton, 1 Gratt. 161; 11 Ired. 95. And see Mundy v. Mundy, 15 N. J. Eq. 290; Graham v. Birch (Minn.) 49 N. W. 697.

the right one.¹ Where the testator asks the custodian of his will to bring the paper to him, intending to revoke it, and the custodian neglects or refuses to comply, no revocation is constituted;² and the same may be said where he sends any one else for the will and it is not brought to him.³ Nor is the testator often without resource in such a case; for he may still revoke his will by some other method.⁴

§ 388. **No Witnesses Necessary to the Burning, Cancelling, etc.**—It is not necessary that the burning, cancelling, tearing, or obliteration of the will by the testator be attested by witnesses. Indeed, a leading advantage which such means of revocation are supposed to afford consists in the secrecy permitted to the lawful disposer.⁵ But various American codes require proof by at least two witnesses where the act is done by some other person under the testator's direction.⁶

§ 389. **Destruction of a Will by Burning, Tearing, etc., illustrated: English Cases.**—The utter destruction of one's will by burning, tearing, and the like, the intent accompanying the act, supplies the simplest instance of revocation. Destruction is the only mode favored in this connection by the English Statute of Victoria and many American codes; defacement being deemed too dubious an act. Not only burning or tearing would satisfy such enactments, but cutting, throwing into the water, steeping in acids, and other equivalent destructive acts.⁷

¹ *Supra*, § 386; *Smiley v. Gambill*, 2 Head, 164; *Hise v. Fincher*, 10 Ired. 139.

² *Laycroft v. Simmons*, 3 Bradf. 35.

³ In *Mundy v. Mundy*, 15 N. J. Eq. 290, a testator asked his wife to bring his will from the place of deposit, intending to burn it. She afterwards induced him to suppose that she herself had brought and burnt it. It was held that there was no revocation, the will not having been burnt.

⁴ A testator, finding himself thus thwarted, may execute a new will, or

a revocation in writing, in presence of witnesses. And if an extreme case should show that by daring force or fraud, and against his protest, the means of revocation were utterly denied him, so that he could not execute his intention, the court would pronounce, perhaps, according to his wishes.

⁵ *Timon v. Claffy*, 45 Barb. 438.

⁶ *Stimson Am. Stat. Law*, § 2672.

⁷ *Wms. Exrs.* 134; *Hobbs v. Knight*, 1 Curt. 768; *Clarke v. Scripps*, 2 Rob. 563, 570, 575.

But the difficulty to solve, is whether statutes like these exclude, by inference, whatever destruction of the instrument falls short of annihilation or at least of rendering original proof of its contents impossible. Some have argued for this narrow construction. But the English courts of probate rule less strictly; and where the testator has cut out his own name from the will with clear intent to revoke it, this act is held a sufficient destruction; for an essential part of the will, an integer, is thereby destroyed, nor does the statute expression "otherwise destroying" necessitate a destruction of the entire instrument.¹ So may cutting out that part of the will which one would call the principal part constitute a sufficient revocation, if the full intent accompanied the act;² or even tearing off the seal *animo revocandi*, though a seal is admitted to be no essential part of a will.³ But to cut out a particular clause or the name of a particular legatee or some minor part of the will, imports only a revocation *pro tanto*.⁴ So too the mutilation of a will by cutting out the executors' clause has been treated as simply revoking the choice of executors.⁵ And while pasting a blank paper may amount to destruction, total or *pro tanto* as the case may be, inasmuch as the original writing becomes effaced in consequence, the idea of "destroying" under the Statute of Victoria, is not

¹ *Hobbs v. Knight*, 1 Curt. 768. It is here observed by Sir Herbert Jenner that, by parity of reasoning, if the names of the witnesses were taken away by the testator *animo revocandi*, it would be a good destruction of the will under the act. The inclination of his opinion was, upon the same principle, that if the testator's signature had been burnt or torn out, or even so carefully obliterated as to be perfectly illegible, this act, accompanied by the suitable intent, would constitute a revocation within the Statute of Victoria. See also *Sir John Dodson in Clarke v. Scripps*, 2 Rob. 563; 5 Notes Cas. 390.

In *Williams v. Tyley, Johns*, 530, it was held a sufficient destruction for one, who intended revoking, to tear off the signatures he had made to the first four

sheets and strike his pen through the last signature; the effect being to make the instrument different in execution from what the attestation clause described.

² *Williams v. Jones*, 7 Notes Cas. 106; *Gullan Re*, 1 Sw. & Tr. 125; 26 Beav. 64.

³ *Price v. Powell*, 3 H. & N. 341. This decision of the Court of Exchequer went upon the ground that the attestation clause declared this instrument to be under seal, and the seal being torn off, the will ceased to be the instrument which the testator purposed to execute and publish.

⁴ *Giles v. Warren*, L. R. 2 P. & D. 401; *Woodward Re*, L. R. 2 P. & D. 206.

⁵ *Maley's Goods*, 12 P. D. 134.

realized by acts which fall short of effacement.¹ Indeed, the English cases which construe that enactment, rely upon some act of destruction, which so far as it goes utterly effaces, and in order to revoke the whole will destroys some integral part essential to the entirety of that will.² And of course the full intention to revoke should accompany the act, or no such consequence will follow.³

§ 390. **The Same Subject.** — Under the Statute of Frauds, however, a very slight act of burning or tearing might suffice for revocation if a genuine intention accompanied the act.⁴ But some burning or tearing, if only of a small part, or so as to scorch or mutilate the paper, was needful; mere intention or attempt did not fulfil the statute; and yet it mattered not that the writing was still legible in spite of the act, or the maker's disposition traceable by putting the torn pieces of his will together.⁵ Where the testator arrests his own design before the act is completed, revocation does not take place.⁶

§ 391. **Cancelling, Obliterating, etc., illustrated: English Cases.** — A more equivocal act is the defacement of the instrument by cancelling, obliterating, and the like: modes of revocation sanctioned by the Statute of Frauds, but discarded because of their uncertain tenor, in the later enactment of Victoria. And here let us remark, that by that earlier legislation such acts as tearing off or effacing one's signature or seal at the end of the will were the common expression of a testator's intention to revoke, and required no

¹ Horsford, Goods of, L. R. 3 P. & D. 211.

² Tearing off signatures and attestation has this effect. *Lewis Re*, 1 Sw. & Tr. 31. And where the will consists of various sheets, each of which is signed and attested, it is the signature and attestation at the end whose destruction is disastrous. *Gullan Re*, 1 Sw. & Tr. 125; 26 Beav. 64. But destroying the principal part of the will may prove equally so. *Ib.* And so with cutting off signatures on earlier sheets, where something in the will or the attestation

clause makes those signatures an integral and necessary part of the will. *Harris Re*, 3 Sw. & Tr. 485. Scratching out signatures with a knife is a revocation within the Statute of Victoria. *Morton's Goods*, 12 P. D. 141.

³ *Cheese v. Lovejoy*, 2 P. D. 251.

⁴ *Bibb v. Thomas*, 2 W. Bl. 1043.

⁵ *Doe v. Harris*, 8 Ad. & El. 1; 1 Jarm. 130.

⁶ *Doe v. Perkes*, 2 B. & Ald. 489; *Colberg Re*, 2 Curt. 832; *Elms v. Elms*, 1 Sw. & Tr. 155.

such strain of interpretation as "English courts must now apply;"¹ for if the act was not "destroying," it might at all events be reckoned as cancelling or obliterating the will. Drawing lines over the testator's name was likewise a sufficient cancellation within the earlier act.² Behind such defacement perhaps might be read the entire will as originally executed, in all its integrity; and though the testator left the instrument among his papers at his death, cut about and through, without any real mutilation of what was written therein, the purpose of cancelling, obliterating, or destroying made such revocation legally sufficient.³ In fact, the principle appears to have been well established in the English courts before 1837, that if the testator intended to revoke by cancelling or obliterating, not to say destroying, his will, and he did all he meant to do by way of expressing that purpose, no literal cancellation or obliteration, and certainly no effacement, was necessary.⁴

Where a pencil was used for cancelling, instead of a pen, the courts regarded the act as *prima facie* deliberative, rather than final. But a final purpose to revoke might be shown, and if so, the cancellation effected that purpose.⁵ As for obliteration under the Statute of Frauds, the effect followed usually the intent; and here the problem was to determine whether such acts as drawing the pen over part of the will amounted to a partial or total revocation, if intended for revocation at all.⁶ This whole subject bristled with practical difficulties, and we need only observe that, under the statute, some act must be done to the paper; that the revocation may be partial or total;⁷ and that cases have refined much upon obliterating the material part of a clause or sentence,

¹ *Scruby v. Fordham*, 1 Add. 78; *Re, L. R. 2 P. & D. 256*. *Contra*, *Lumbell v. Lumbell*, 3 Hagg. 568. *Cf. Tomlinson's Estate*, 133 Penn. St. 245, *supra*, § 389.

² 2 Cas. Temp. Lee, 34. But *cf. Grantley v. Garthwaite*, 2 Russ. 90.

³ *Moore v. Moore*, 1 Phillim. 357.

⁴ 1 Wms. Exrs. 133.

⁵ *Mence v. Mence*, 18 Ves. 348; *Francis v. Grover*, 5 Hare, 39; *Hall*

than with ink, though the will was written in ink.

⁶ 1 Jarm. Wills, 134, 135.

⁷ 1 Jarm. Wills, 134, 135; *Sutton v. Sutton*, Cowp. 812.

such as the devisee's name, whereby the devise or gift becomes *ipso facto* revoked.¹

§ 392. **The Same Subject.**—On the other hand, no mere defacement or crossing out of the testator's signature, so as to leave it still legible, will satisfy the present Statute of Victoria; for this constitutes no destruction within the act.² And if a will should show the testator's signature struck through with a pen and another signature written and left, the natural presumption would be that the original erasure was not made with the intention to revoke at all, but was connected in some way with the final execution by the signature substituted.³ Cancelling or mere obliteration constitutes no revocation, as the English law now stands; but the words as originally written must, to one who looks at the will, be quite illegible.⁴

§ 393. **Burning, Tearing, Cancelling, etc., illustrated: American Cases.**—Allowing for differences of local legislation, the American doctrine closely resembles that of England; and as a State enactment conforms to the looser or more rigid policy, so must be the course of judicial precedents in that jurisdiction. In States which permit of cancelling and obliterating, as well as destruction, tearing off the seal of a will (needless as a seal may be for its proper execution) constitutes a revocation when the intent accompanies the act.⁵ Drawing lines over the testator's name *animo revocandi* amounts further-

¹ See *Swinton v. Bailey*, 4 App. Cas. 70; *Larkins v. Larkins*, 3 B. & P. 16; *Mence v. Mence*, 18 Ves. 350. The discussion of a gift of this kind, where the clause cancelled or obliterated designates various parties in interest, invites some very nice distinctions. See 1 Jarm. Wills, 134, 135, and cases cited.

² *Benson v. Benson*, L. R. 2 P. & D. 172; *Stephens v. Taprell*, 2 Curt. 458; 4 Notes Cas. 101.

³ *King, Goods of*, 2 Robert, 403.

⁴ *Stephens v. Taprell*, 2 Curt. 458; 1 Jarm. Wills, 142; 4 Notes Cas. 101; *Brewster Re*, 6 Jur. N. S. 56.

The policy of 1 Vict. c. 26 is further enforced by § 21 of that enactment, which declares that no obliteration, etc., of a will, after its execution, shall have any effect, "except so far as the words or effect of the will before such alteration shall not be apparent," etc., unless executed as a will. See c. 2, *post*, as to alteration of a will, where this subject is discussed more fully.

A writing declaring an intention to revoke, and executed as a will, may supplement a doubtful erasure. *Gosling's Goods*, 11 P. D. 79; § 404.

⁵ *Avery v. Pixley*, 4 Mass. 460; *John-*

more to revocation by cancelling, even though his signature be still legible.¹ And tearing a will into several fragments will suffice, though the fragments be gathered up afterwards.²

Cancellation by drawing lines across is an equivocal act, however, and may be explained by circumstances and proof of intent.³ So again, must the intention of the testator decide whether an obliteration of the will is a revocation or not.⁴ A careful interlineation cannot be pronounced an "obliteration" within the wills act.⁵ Nevertheless, cancelling or obliterating are acts very liberally construed at the old law; and as distinguished from destruction or defacing the writing so as to leave it illegible, the act implies that the instrument is still preserved in legible shape, but with something upon it which indicates that the will (or at least some portion of it, if revocation be *pro tanto*) has ceased to stand according to the testator's original intention.⁶

§ 394. **The Same Subject.**—Slight acts accompanied by the suitable intent, are often permitted to suffice for this sort of revocation. Under our earlier legislation, it is ruled that

son *v.* Brailsford, 2 Nott & McC. 272. In *White's Will*, 25 N. J. Eq. 501, there was obliteration of signatures, besides tearing off the seal.

Where a will is signed several times, and also at the end, it is the last whose erasure repeals the will. *Evans' Appeal*, 58 Penn. St. 238.

¹ *Baptist Church v. Robbarts*, 2 Penn. St. 110. Even the drawing of pencil-marks over the signature is held sufficient in *Woodfill v. Patton*, 76 Ind. 575.

² *Sweet v. Sweet*, 1 Redf. 451. Here the intended revocation was clear, and the act was held complete, though the testator's wife gathered the fragments again, unknown to him, and sewed them carefully together, so that the will was legible. And see *Evans' Appeal*, 58 Penn. St. 238; 133 Penn. St. 245.

³ *Bethel v. Moore*, 2 Dev. & B. 311; *Smock v. Smock*, 11 N. J. Eq. 256.

⁴ *Jackson v. Holloway*, 7 Johns. 394; *Means v. Moore*, 3 McCord, 282. And

see *Frear v. Williams*, 7 Baxt. 350. Erasures which do not materially affect the meaning or force of the will have not the effect of legal revocation. *Clark v. Smith*, 34 Barb. 140.

⁵ *Dixon's Appeal*, 55 Penn. St. 424.

⁶ *Evans' Appeal*, 58 Penn. St. 238. A will may be cancelled by an act done to the instrument which stamps upon it an intention that it shall have no effect, though the act be not a complete obliteration or physical destruction. "Obliteration" in the wills act is not confined to effacing letters or words so that they cannot be read. And "cancellation" of a will means any act done to it which in common understanding is regarded as cancellation when done to another instrument. It must be an act done to the will itself *animo cancellandi*. *Ib.*

Obliteration, etc., of the envelope of a will is not effectual, the paper itself remaining intact. *Grantly v. Garthwaite*, 2 Russ. 90.

the slightest tearing or burning, even of an unnecessary part of a will, accompanied by evidence *aliunde* of the intention to revoke, is a revocation.¹ The destruction or cancelling of a principal part of the will may serve for the whole.² But a will cannot be revoked by any mental intention of the testator, even though such intention be evidenced by a written statement, unless the statutory forms, whatever those may be, are complied with.³ Apart from that consideration, the broad inquiry must be, what, in view of the surrounding circumstances, the testator really intended; and revocation, whether of the whole instrument or a part, should be determined accordingly.⁴ Such is the American doctrine, and it differs not from that of the mother country.

But some of our latest American enactments are quite as rigorous as that of Victoria, in confining simple revocation of the instrument itself to acts whose nature is to destroy. Thus, under the Iowa Code, which provides that a will may be revoked by destruction or by cancellation with intent to revoke, if the cancellation is witnessed in the same manner as a will, it is held that a will is not revoked by interlining or drawing a scroll through the signature so as to leave it still legible. For, admitting that to destroy is not necessarily to annihilate, within this statute, there can be no destruction unless the essential words destroyed are rendered illegible; and as for merely cancelling, by anything short of this effect, it cannot operate unless witnessed like a will.⁵

§ 395. **Incomplete Burning, Tearing, Cancelling, etc.** — No greater difficulty is presented in this connection than that of

¹ *Dan v. Brown*, 4 Cow. 483; 6 Ib. 377; *Johnson v. Brailsford*, 2 Nott & M. 272; 4 Kent Com. 582.

² In *Müh's Succession*, 35 La. Ann. 394, four-fifths of the legacies were erased with the pen, but still legible; the clause appointing executors was erased more completely, and the testator's signature was left hardly legible at all. In the margin were several additions, apparently designed for a new will. It was held the will was revoked.

³ *Delafield v. Parish*, 25 N. Y. 9; *Blanchard v. Blanchard*, 32 Vt. 62.

⁴ See *Cook R.*, 5 Pa. L. J. 1, where the testator tore off his name at the foot of a codicil, and this was held, in view of the proof, to revoke the codicil only, and not the will on the reverse side of the paper, though some words which the will contained were carried away. And see cases cited in preceding section.

⁵ *Gay v. Gay*, 60 Iowa, 415.

determining the legal effect of an inchoate or incomplete act of burning, tearing, cancelling, etc., according as the local statute prescribes. But next to considering the limits which the local statute may have set to the act of revocation, the cardinal inquiry relates to the intention which appears to have accompanied the testator's act. Moreover, as every court means to decide justly, and according to the real merits of the controversy, where it may, the inchoate or incomplete act is helped out if possible, when the fraud of others impaired its efficiency ; but otherwise, when the testator alone was at fault in not doing all that the court asked of him to make his act positive and final.

Thus, to take that range of acts most widely permitted by legislation under this head, namely, burning, tearing or otherwise destroying. Under the Statute of Frauds, a case arose where the testator ordered his will to be brought to him ; he opened it, looked at it, gave a wrench so as nearly to tear it, then rumbled it up and threw it contemptuously upon the fire. But the will fell off ; and as it lay where it must soon have been burnt, a woman in the room picked it up and put it in her pocket. The will was produced for probate, after his death, slightly singed and with the writing still legible. It was held in this case that there was a sufficient "burning or tearing," within the statute, and that the revocation was complete.¹ Yet, as the authorities agree, there must be an actual burning or tearing, etc., to some extent in order to constitute a revocation ;² and accordingly, where another testator, who also intended to destroy, threw his will upon the fire, from which some one rescued it in a similar manner, but with only a corner of the envelope burned, revocation was held incomplete.³

The courts appear to have reconciled these decisions by drawing the line between scorching the surface of a will and burning only the envelope which contains it ;⁴ but such a line must be physically an exceedingly fine one.⁵ We ap-

¹ *Bibb v. Thomas*, 2 W. Bl. 1043.

² *Supra*, § 389.

³ *Doe v. Harris*, 6 Ad. & El. 209.

⁴ English text-writers seem to take

this same distinction in their contrast of these cases. See 1 Wms. Exrs. 137.

⁵ The cases cited under the earlier

statute do not stand upon a "destruc-

prehend that other circumstances really strengthened the present distinction and caused the court to stretch the act in the one case so as to correspond with the testator's intent, while in the other, the intent was not positive enough to bear out the act. In the former, the testator meant that his will should be destroyed, and imagined that he had completed the act; the woman who rescued the will deceived him in preserving it.¹ But in the latter, the testator saw his will snatched from the fire, and parleyed with the rescuer; that person promised to throw it into the fire again, but did not; so that the case resolved itself into the disobedience of a testator's direction to destroy, a preservation of the will in breach of trust. Such conduct constitutes no legal revocation of a will;² and a careful testator, fully resolved to carry out his intention, would have watched to see his direction obeyed and the will burnt before his eyes. An incomplete or inchoate act fails utterly when the intent was incomplete; nor can another's fraud be set up which the testator's own fault promoted.³

§ 396. **The Same Subject.**—From other instances in the reports, the effect of complete intention may be contrasted

tion" to the extent of rendering essential words illegible. How seldom, then, would it occur that if the envelope was burned, the instrument would not at least show signs of being scorched.

¹ *Bibb v. Thomas*, 2 W. Bl. 1043.

² *Runkle v. Gates*, 11 Ired. 95; 1 Gratt. 161; *Boyd v. Cook*, 3 Leigh, 32; *supra*, § 387.

³ *Doe v. Harris*, 6 Ad. & El. 209. Had the person, in this case, who snatched the will from the fire substituted another paper adroitly, and burnt that instead, the testator using such vigilance against the deception as his infirmities permitted, there would, *semble*, have been a legal revocation. See *Pryor v. Coffin*, 17 Geo. 444; *Smiley v. Gambill*, 2 Head, 164; *Blanchard v. Blanchard*, 32 Vt. 62; *Hise v. Fincher*, 10 Ired. 139; *supra*, § 387.

American cases appear to justify our line of distinction. Thus, where the maker of a will threw it on the fire, meaning to destroy and revoke it, and it was burned through in three places without interfering with the writing, and the will was then rescued and preserved against his intention and without his knowledge, the court construed this into a sufficient revocation. *White v. Casten*, 1 Jones L. 197. And see *Mundy v. Mundy*, 15 N. J. Eq. 290. But *Graham v. Birch*, (Minn.) 49 N. W. 697, discountsenances the idea of a formal destruction which the fraudulent device of another frustrated, where in fact the testator was careless and the will was put into a stove where no fire was lit for two hours after.

with incomplete where the act was equivocal. One man tears up his will under a mistaken impression that its provisions are of no effect; then recovering himself he gathers the pieces together once more, and preserves them carefully, meaning that the instrument shall serve its original purpose.¹ Here it has been held no complete revocation ever took place; and we may imagine similar cases, as where one's will is accidentally torn while destroying his old letters, and the testator takes the fragments from the waste-basket, and restores the paper. But another man tears his will, intending to destroy it; and his wife or adult child collects the pieces and puts them together again neatly, without his knowledge; here there is revocation, for though the fragments were not minute, the *animus revocandi* was complete, and fraud must not prevail against it.² The minuteness of the tearing is of secondary consequence; though without some tearing revocation would not have occurred.

In an English case which turned upon the Statute of Frauds, the testator, under a sudden impulse of anger against one of the devisees under his will who had provoked him, took the paper into his hands to destroy it. He tore the will twice through, when a bystander arrested his arm, and, the offending devisee submitting on the spot, the testator grew calm and proceeded no further. He fitted the pieces together, and finding not one word obliterated, remarked that it was good it was not worse. Upon this evidence a jury found that the act of destruction intended had never been completed, and the Court of King's Bench sustained the verdict. No revocation, in short, had taken place, and the will remained in full force.³ A later case, where the testator tore his will almost in two, but was stopped by the protest of others in the room, who told him that it would be dangerous to destroy one will before he had made another, was decided on the same principle.⁴

¹ *Giles v. Warren*, L. R. 2 P. & D. 401.

⁴ *Elms v. Elms*, 1 Sw. & Tr. 155.

² *Sweet v. Sweet*, 1 Redf. 451.

And see *Giles v. Warren*, L. R. 1 P. &

³ *Doe v. Perkes*, 3 B. & Ald. 489.

D. 401.

And see *Colberg*, Goods of, 2 Curt. 832;

Giles v. Giles, 1 Cam. & Nor. 174.

In all such cases it is of much consequence that the testator treats the burned or mutilated instrument as valid, for the rest of his life; for this circumstance indicates that a final and full revocation was never intended by him. And we apprehend that under strict statutes like that of Victoria, which require an act of "destroying," there must be some injury committed to the extent of destroying the entirety of the will or rendering a material part thereof illegible, else no revocation will occur.¹

§ 397. **Revocation of a Part only of a Will by Destruction.**—An analogous difficulty in the doctrine we are discussing relates to acts of revocation *pro tanto*. The English Statute of Victoria, while insisting upon some sort of destruction, appears to allow part only of the will to be revoked in that manner.² Under the older law, as we have seen, one had a very liberal discretion to revoke his will in part, and annul some particular devise or bequest, if such was his actual intention, by obliterating or cancelling a particular clause, or even material words therein, the rest of the will standing as before, agreeably to his supposed intent.³ Great license prevailed, in consequence, this privilege of the testator extending to altering or interlining the original instrument at pleasure so as in effect to make a new will, and that with

¹ English writers consider it difficult to state at present any precise extent to which the burning, tearing, etc., must go in order to justify constructive revocation, under the new Statute of Wills, in an equivocal case. 1 Wms. Exrs. 137. Coleridge, J., considered this point in *Doe v. Harris*, 6 Ad. & El. 209. "There must be such an injury, with intent to revoke," he observes, "as destroys the entirety of the will; because it may then be said that the instrument no longer exists as it was." This view is supported by *Hobbs v. Knight*, 1 Curt. 768, and the other cases cited, *supra*, § 389. See also *Gardiner v. Gardiner* (N. H.) 19 Atl. 651.

² 1 Wms. Exrs. 129; *Clark v. Scripps*,

2 Rob. 593, 567; *Christmas v. Whinyates*, 3 Sw. & Tr. 81. "No will or codicil, or any part thereof, shall be revoked otherwise than, etc., or by the burning, tearing, or otherwise destroying the same." 1 Vict. c. 26., § 20. But as to the effect of obliteration in part, see language of ib. § 21; c. 2, *post*.

³ *Supra*, § 391; *Swinb.* pt. 7, § 16, pl. 4; *Sutton v. Sutton*, Cowp. 812; *Scrubby v. Fordham*, 1 Add. 78; *Larkins v. Larkins*, 3 B. & P. 16; *Swinton v. Bailey*, 4 App. Cas. 70. This law applied both to devises of land and written wills of personal property. 1 Wms. Exrs. 143, and cases *supra*. The Statute of Frauds speaks of revoking a devise or "any clause thereof." *Supra*, § 381.

very little formality.¹ Under the Statute of Victoria this practice was checked by an express provision that obliterations, interlineations or other alterations should be executed with testamentary formalities; not to add its confinement of revocation to acts of destruction.² Yet it would appear that one may still revoke *pro tanto* under that act by tearing up or burning one or more sheets of his will (supposing it written on several sheets), as he was permitted to do by the Statute of Frauds, and still earlier by the common law.³

This doctrine of partial revocation, even under the restrictions adopted by later English legislation, is not greatly favored in American codes at the present day. Many of our local enactments, it is true, once pursued the language of 29 Car. II., so as to admit of revocation *pro tanto*; but of late years that language has undergone a change of expression in leading States. Various codes now drop all reference to revocation in part; and the general policy intimates that such changes of disposition require an instrument executed with all the formalities of a will.⁴ The New York statute provides expressly that no will shall be revoked or altered except by another will or "unless such will be burnt, torn, cancelled, obliterated or destroyed," etc.; and this is lately construed not to admit of obliterations in part, with a revocation in effect *pro tanto*.⁵ In other instances our courts have disavowed the earlier common law doctrine on this point.⁶

¹ *Mence v. Mence*, 18 Ves. 348; *Ravenscroft v. Hunter*, 2 Hagg. 68; 1 Wms. Exrs. 143. Drawing a pen across the name of a devisee or legatee may thus revoke the devise or bequest. *Mence v. Mence*, *ib.* But it is otherwise where such name occurs several times, and the testator draws his pen across in some places and leaves the name standing in others. *Martins v. Gardiner*, 8 Sim. 73.

² 1 Vict. c. 26, § 21; *ib.* § 20.

³ 1 Wms. Exrs. 128, 141, 143; *Scruby v. Fordham*, 1 Add. 74; 3 Hagg. 552. And see next c.

⁴ See Mass. Pub. Stats. (1882) c. 127,

§ 8. But this omission of statute reference to revoking "in part" does not, as the Massachusetts statute reads, exclude a partial revocation in this manner. *Bigelow v. Gillott*, 123 Mass. 102. The context, were it thus construed, would exclude the right to revoke in part by a codicil. *Ib.*

⁵ *Lovell v. Quitman*, 88 N. Y. 377; 25 Hun, 537. This overrules *McPherson v. Clark*, 3 Bradf. 96. And see *Prescott Re*, 4 Redf. 178; c. 2, *post*; 1 Demarest, 484; *Stimson Am. Stat. Law*, § 2672.

⁶ *Eschbach v. Collins*, 61 Md. 478.

The intended obliteration of a part with-

But American cases may be found of earlier or later date, where, conformably with the local statute then operating, a partial revocation with suitable intent has been applied to the cancelled portion of the will, leaving the residue unchanged.¹

§ 398. **Difficulty where the Revocation depended upon Another Act.** — Another difficulty suggested in this connection relates to the effect of destroying or cancelling where the testator meant that his act should depend upon some other efficient act; as where a second will was to be substituted for the will revoked. Here the courts have tried to pursue the testator's intention and accept its guidance; a course which is often the harder for the reason that a testator's mind has not grasped the exigency at all. In a leading English case a testator prepared his second will and then cancelled the first; but the second will proved void for non-compliance with the statute forms of execution; and the court accordingly ruled that the first will remained in force, inasmuch as the revoked act, which depended upon the validity of the substituted paper, never took full effect.² Here it happened, however, that the second will varied not materially from the first; in fact, making a change in the name of one of the trustees, but not changing the disposition of the estate. But later courts, while recognizing the same principle, extended its operation much farther; defeating thereby, in some instances, the testator's presumable preference, as it would seem, for the sake of establishing a permanent principle.³ And the principle appears to be this: that

out the intention of revoking the whole will, cannot constitute a full revocation. *Means v. Moore*, Harp. (S. C.) 314. The Alabama statute does not permit of a partial revocation. If the name of one of the legatees appears erased from the will offered for probate, this may be offered to prove that a total revocation was intended, but not a partial one. *Law v. Law*, 83 Ala. 432.

¹ *Brown's Will*, 1 B. Mon. 56; *Borden v. Borden*, 2 R. I. 94; *Kirkpatrick*

Re, 22 N. J. Eq. 463; *Bigelow v. Giltott*, 123 Mass. 102; *Myrick Prob.* 128.

Tomlinson's Estate, 133 Penn. St. 245, is an extreme case, which not only permits of the partial revocation of a will under the local statute, but allows legacies to be thus cancelled in a will written out in ink by mere lead-pencil alterations, without, of course, obliterating what was originally written.

² *Onions v. Tyrer*, 2 Vern. 742.

³ See *Burtenshaw v. Gilbert*, Cowp.

where the cancelling or destroying his first will was made by the testator to depend upon the validity of his second will or substitute, and the second will or substitute cannot legally take effect, such cancelling or destroying fails to operate as a revocation, even though the revoking act would *per se* have sufficed.

But this rule appears to be confined in modern practice to cases in which the testator evidently meant his revocation to depend upon the validity of the substituted will and where the two dispositions are closely connected, the one to make way for the other. Revocation, as an immediate and positive act, cannot be so dependent for its validity upon some ill-defined purpose which the testator cherishes to make another and a different will hereafter. And we may regard it as a principle that any will which is deliberately destroyed without accident or mistake, the full present purpose to revoke accompanying the act, becomes revoked, even though the testator meant to make a new will at some future time as its substitute, but omitted to do so.¹ For the mere indefinite purpose to make another will hereafter does not prevent an immediate revocation from taking effect.² And in general, a present revocation is quite consistent with some purpose to execute hereafter another will, which purpose is never really carried into effect;³ for here the law of intestacy appears to supply the testator's wishes more appropriately if a hiatus is left than the scheme of disposition which the testator had himself recalled. Nor does the cancelling of a new will restore the former one which has been finally cancelled and revoked.⁴

Other instances may be adduced in this connection where dependent acts of revocation fail because that which was depended on gained no efficacy. As where it appears that

52; *Perrot v. Perrot*, 14 East, 440; *Thynne v. Stanhope*, 1 Add. 53; 1 Wms. Exrs. 148-152; 1 Eq. Cas. Abr. 409; 3 ib. 776.

¹ *Semmes v. Semmes*, 7 Har. & J. 388; 1 How. (Miss.) 336.

² 32 L. J. Prob. 202; *Williams v. Tyley, Johns*, 530.

³ *Brown v. Thorndike*, 15 Pick. 338; *Johnson v. Brailsford*, 2 Nott. & M. 272.

⁴ 4 Kent Com. 531. But see *c. post*, as to republication; *Marsh v. Marsh*, 3 Jones L. 77.

the testator did not intend to die intestate ; but made alterations in his first will, as preparatory to executing a new one, and not for a final cancelling of the former ; and his death prevented his second will from being executed.¹ But if the second will or substitute be legally prepared and duly executed, so as to take the place of the cancelled instrument in probate, revocation is not hindered by a failure or disappointed operation of the second disposition through a legal construction of its terms.² Prudence suggests, on the whole, that a testator who prefers his old will to stand rather than die intestate, should carefully refrain from cancelling or destroying it until the new one has been executed in due form.

§ 399. **Revocation, where Wills are executed in Duplicate.** — If, as sometimes is done for the greater security, a testator executes his will in duplicate, keeping only one part while his executor, attorney, or another in his confidence has custody of the other, the effect of destroying or cancelling one of such papers without the other may give rise to controversy. Doubtless his true and safe course is to gain control of both papers and revoke them equally by one and the same act. But this is not essential ; for where a testator cancels or destroys by a suitable act the paper in his own possession, it may be strongly presumed that he does not intend the duplicate to stand.³ On the other hand, if he has possession of both papers and destroys or mutilates one, leaving the other intact, the will may be presumed unrevoked.⁴ The strength of the presumption

¹ Applebee, Goods of, 1 Hagg. 153; 32 L. J. P. M. & A. 202; Eeles, Goods of, 2 Sw. & Tr. 600. In *Hyde v. Mason*, cited 1 Wms. Exrs. 149, 150, and 4 Burr. 2515, the testator altered the duplicate of his first will, leaving the duplicate intact with the executor.

² As if the second disposition should fail, because the legatee was incapable of taking. *Tupper v. Tupper*, 1 Kay & J. 665; *Quinn v. Butler*, L. R. 6 Eq. 225.

³ Cowp. 49; 2 Phillim. 23; *Strick-*

land v. Strickland, 8 C. B. 724; *Pemberton v. Pemberton*, 13 Ves. 310; *O'Neill v. Farr*, 1 Rich. 80. And see *Rickards v. Mumford*, 2 Phillim. 23; 2 Hagg. 266. Where a testator executed in duplicate, delivering a copy to his wife, and it does not appear what became of the latter copy, the inference is that the will offered for probate is the instrument he retained. *Snider v. Burks*, 84 Ala. 53.

⁴ *Roberts v. Round*, 3 Hagg. 548.

See Lord Chancellor Erskine's rules of

in equivocal acts will vary, however, according to circumstances; possession or non-possession of the duplicate being the element chiefly regarded, and yet not conclusive of the issue.¹

§ 400. **Effect of destroying, etc., Will, but not Codicil.**—Where, again, there is a will and codicil, and the will appears to have been destroyed, but not the codicil, the question arises whether the act of revocation has annulled both instruments. This must be determined by circumstances; and, as in duplicate wills, a testator's custody of both instruments or of one only may go far to aid the solution. But supposing the testator to have kept possession of both papers or had equal access to them, the effect of revoking his will alone must turn mainly upon the dependence or independence of the codicil. If the provisions of the codicil are inseparably blended with those of the will, the act which revokes the will revokes the codicil also; but if the codicil may from the nature of its disposition stand readily by itself, its validity remains unimpaired by an act which left that instrument intact, while destroying the will.²

§ 401. **Presumptions, etc., where Will is found mutilated, defaced, etc.**—Where a will is found torn, mutilated, or defaced at the testator's death, it is admissible to show that this was the result of use or accident, and not design on his part;³ or that it was done by some one else without his direction and presence: for the vital question is, whether the testator meant thereby to revoke or not. And as bearing upon this question the treatment of the instrument, the place and period of its exposure, the character of the injury suffered, and other circumstances attending its production after the testator's

presumption as laid down in *Pemberton v. Pemberton*, *supra*.

¹ 1 Jarm. Wills, 137, 138; 1 Wms. Exrs. 154-156; *Strickland v. Strickland*, 8 C. B. 724; *Hubbard v. Hubbard*, 3 Ch. D. 738.

It will not be presumed from circumstances that a will was executed in duplicate, when the attesting witnesses

say that but one copy was executed. *O'Neill v. Farr*, 1 Rich. 80.

² Cf. *Tagart v. Squire*, 1 Curt. 289, and *Coppin v. Dillon*, 4 Hagg. 369; 2 Add. 116, 229; 1 Jarm. Wills, 139.

³ 1 Jarm. Wills, 133; 2 No. Cas. 601; *Clarke v. Scripps*, 2 Rob. 563; *Giles v. Warren*, L. R. 2 P. & D. 401; *Woodward & L. R.* 2 P. & D. 206.

death, may prove material where direct evidence of his intention is wanting.¹

Yet the natural presumption arises, where the will remained in the testator's custody until his death, and then was found defaced, mutilated, or partially destroyed, that the act was done by the testator himself.² From the appearance of the instrument as produced under such circumstances, however, active or passive conduct is inferable, as the case may be; but positive and active defacement or destruction warrants a conclusion, in the absence of other evidence, that the testator intended to revoke; though whether by an act sufficient or insufficient, statute construction must determine.³ Where, however, the will remained in a different custody and inaccessible to the testator, it may rather be presumed that the defacement or destruction was not done by authority of law, that is to say, by the testator or in his presence and under his direction.⁴

But all presumptions of this sort weigh lightly, and they may be rebutted by proof of the actual facts; declarations and conduct of the testator himself, the conduct and admissions of custodians of the will, and other material testimony

¹ See *Lawyer v. Smith*, 8 Mich. 411, where a will twenty-five years old was found in a barrel of waste papers after the testator's death. Throwing away a will is not generally a sufficient revocation. But the case may be supposed, where a testator throws it into the water or the fire and it is rescued without his knowledge. See also *Fellows v. Allen*, 60 N. H. 439; *Blakemore's Succession* (La.) 1891.

² *Christmas v. Whinyates*, 3 Sw. & Tr. 81; 4 Kent Com. 532; 1 Jarm. Wills, 133.

Where a will was found torn or cut in two, in a bureau drawer of the testator, a place other than that where his valuable papers were usually kept, parol evidence of the testator's acts and declarations at various times between the making of the will and his death, was held admissible to show whether the mutilation in question was intended by

way of revoking his will. *Patterson v. Hickey*, 32 Ga. 156. See also *Smock v. Smock*, 11 N. J. Eq. 156; 47 Ohio St. 323.

³ *Swinb.* pt. 7, § 16; pl. 5; 1 Wms. Exrs. 157; 1 Cas. temp. Lee, 444; *Lambell v. Lambell*, 3 Hagg. 698; *Baptist Church v. Robbarts*, 2 Penn. St. 110. From the sufficient act the law further presumes the intention. 1 Wms. Exrs. 147, 157; 3 Hagg. 568. See *Bell v. Fothergill*, L. R. 2 P. & D. 148, where revocation in act and intent was presumed, notwithstanding the testator appeared to have stuck the signature on again in place.

The *onus* of making out that the cancellation of a will was the act of the testator himself lies upon those who oppose the will. *Hitchins v. Wood*, 2 Moore P. C. 355; 1 Wms. Exrs. 159.

⁴ *Bennett v. Sherrod*, 3 Ired. L. 303.

aiding the investigation in a given case. The conclusion results, that the testator fully intended to revoke, or else that his intention wavered and was never completely carried out, or once more, that he had no intention to revoke at all; and in this last instance, accident, the testator's own carelessness, or the carelessness or fraud of some one else may account for the appearance of the paper, and furnish to the triers a choice of inferences. And after all, a testator's full intention to revoke by what he does to the instrument may be thwarted by the insufficiency of his own act; and his intention may have been to revoke in part only or alter the will by a warranted or unwarranted exercise of discretion under the local statute, as the case may be.¹

§ 402. **Presumption, etc., where Will cannot be found.** — So, too, where it is proved that a will was made and the testator retained custody of it or had ready access to it, the presumption arises, if the will cannot be found after his death, that he destroyed it with the intention of revoking it; though such a presumption may be overthrown by circumstantial or other proof to the contrary.² Where, however, another person was the custodian of the will, and the testator had not ready access to it, there appears no such presumption;³ nor

¹ As to mere obliterations and interlineations appearing on the face of a will, and nothing to explain them, it is presumed that they were made after the will was executed; and so, too, with mutilations. See next c.; also 1 Jarm. Wills, 143, 144; Cooper v. Bockett, 4 Moore P. C. 419; Greville v. Tyler, 7 ib. 320; Burgoyne v. Showler, 1 Rob. 5.

² 1 Wms. Exrs. 157, and cases cited; 2 Phillim. 23; 3 Phillim. 126; L. R. 1 P. & D. 281, 309, 371; Lillie v. Lillie, 3 Hagg. 184; 1 Curt. 289; Finch v. Finch, L. R. 1 P. & D. 371; Weeks v. McBeth, 14 Ala. 474; Southworth v. Adams, 11 Biss. C. C. 256; Minkler v. Minkler, 14 Vt. 125; Hammersley v. Lockman, 2 Demarest, 524; Foster's Appeal, 87 Penn. St. 67; Mercer v. Mackin, 14 Bush, 434; Schultz v. Schultz, 35 N. Y. 653; Brown v. Brown,

10 Yerg. 84; Davis v. Sigourney, 8 Met. 487; Johnson's Will, 40 Conn. 587; 98 N. C. 135. So if a will was executed in duplicate, and the part which the testator retained cannot be found after his death, the presumption is that he destroyed it *animo revocandi*. 2 Phillim. 23; Calvin v. Fraser, 2 Hagg. 266; *supra*, §§ 283, 399. The mere fact that the will was in existence a short time before the testator's death does not overcome the presumption that, having the opportunity, the testator revoked it by destruction. Collyer v. Collyer, 110 N. Y. 481.

³ See Schultz v. Schultz, 35 N. Y. 653. The custodian's explanation may help clear the question. See 10 N. J. Eq. 196; Behrens v. Behrens, 47 Ohio St. 323.

where the testator was insane for the intervening period until he died.¹ If a will last traced to the testator's custody cannot be found at his death, the presumption that he destroyed it for the purpose of revocation outweighs the probability of its fraudulent and criminal destruction by another, when unsupported by any evidence except that of opportunity,² though this latter circumstance is always worthy of consideration with other proof. And where it is shown that the testator had been aware, while alive, that his will was lost when in his own custody, and yet, with ample opportunity, made no attempt whatever to reproduce or republish its contents, a court may fairly assume that he in reality revoked it.³

A sufficient act of revocation with sufficient intent being disproved or not presumable, the contents of the destroyed or missing will may be established upon secondary proof of its contents; as by draft, copy, or the testimony of the scrivener who wrote it, or other sufficient parol proof.⁴ If the destruction of the will was procured by the compulsion or fraud of some third person, satisfactory proof, oral if need be, should also be furnished.⁵

¹ *Sprigge v. Sprigge*, L. R. 1 P. & D. 608.

² *Bauskett v. Keitt*, 22 S. C. 187; *Collyer v. Collyer*, 110 N. Y. 481.

For an exhaustive historical dissertation upon the jurisdiction of probate courts, unless forbidden by statute, to admit upon proof a lost, suppressed, or destroyed will, see *Dower v. Seeds*, 28 W. Va. 113. Chancery, by a bill suitably brought, has exercised a similar jurisdiction. *Ib.* See further 15 P. D. 170; *Brookie v. Portwood*, 84 Ky. 259.

³ *Deaves's Estate*, 140 Penn. St. 242.

⁴ 3 Sw. & Tr. 449; *Burls v. Burls*, L. R. 1 P. & D. 472; 1 P. D. 431; 1 Phillim. 149; *Sugden v. Lord St. Leonards*, 1 P. D. 154; *Ford v. Teagle*, 62 Ind. 6.

⁵ 1 Wms. Exrs. 158; *Foster v. Foster*, 1 Add. 462; *Podmore v. Whatton*, 3

Sw. & Tr. 449; *Card v. Grinman*, 5 Conn. 164; *Burns v. Burns*, 4 S. & R. 294. Statutes are found establishing the method of proving a lost or missing will, and containing various other provisions as to the procedure. See *Mosely v. Carr*, 70 Ga. 333, 4 Dem. 53. If the testimony varies materially upon the essential features of the disposition, the will cannot be proved. 6 Abb. N. Cas. (N. Y.) 234. But according to *Sugden v. Lord St. Leonards*, 1 P. D. 154, probate may be granted of so much of the will as the evidence ascertains, though the other part be not ascertained. See *Schoul. Exrs.* § 84. See also *Apperson v. Dowdy*, 82 Va. 776. But *cf.* *Woodward v. Goulstone*, 17 App. Cas. 469, which seriously questions whether probate of a residuary bequest alone ought to be granted, unless the court

§ 403. Declarations of the Testator in issues of Revocation.

— As bearing upon the issue of revocation or no revocation by means of an act done to the instrument, accompanying declarations of the testator, either verbal or written, may be shown at the probate, as part of the surrounding circumstances evincing this intent.¹ And so too, where the effect of doubtful acts of revocation is to be established.² But when the act done constitutes no legal revocation at all, his declarations of intent are superfluous and inadmissible.³ If the will be lost or missing, after the testator's death, his oral or written declarations are held admissible not only for rebutting any presumption that he had revoked the will, during his life, but also as tending to show by secondary proof, what were its contents.⁴ But some of the latest decisions tend to restrain this principle.⁵

In cases which involve the issue not of express revocation such as we have described, but of implied revocation, by inference of law — as in the case of remarriage or other change of circumstances — the weight of authority is against admit-

feels satisfied that it comprehends the whole testamentary purpose of the deceased.

The contents of a lost will should be fairly proved. 66 Cal. 487. But not "beyond a reasonable doubt." 82 Ala. 352. One witness, or less than the attesting number may establish it. 82 Ala. 352; 118 Ill. 576. But such a will should not be probated upon mere agreement of counsel. 6 Dem. 31. As to proving a revocation of former wills by a later will, which is lost or destroyed, and whose contents cannot be proved other than the revocatory clause, see *Cunningham, Re*, 38 Minn. 169, and cases cited.

¹ *Evans's Appeal*, 58 Penn St. 238.

² *Patterson v. Hickey*, 32 Ga. 156; *Collagan v. Burns*, 57 Me. 446; 8 Mich. 411; *Pickens v. Davis*, 134 Mass. 252.

³ *Gay v. Gay*, 60 Iowa, 415; *Jackson v. Kniffen*, 2 Johns. 31; *Hargroves v. Redd*, 43 Ga. 142; 34 Barb. 140.

⁴ *Sugden v. St. Leonards*, 1 P. D. 154;

Keen v. Keen, L. R. 3 P. & D. 105; 6 P. D. 1; *Johnson's Will*, 40 Conn. 587; *Lawyer v. Smith*, 8 Mich. 411; *Patterson v. Hickey*, 32 Ga. 156; *Pickens v. Davis*, 134 Mass. 252, 258. Cf. *Collagan v. Burns*, 57 Me. 440, where the court was equally divided.

⁵ The House of Lords has lately (1886) discredited *Sugden v. Lord St. Leonards*, *supra*. See *Woodward v. Goulstone*, 11 App. Cas. 469, where a will was lost, and nothing was offered in proof of its contents but the post-testamentary declarations of the testator concerning its contents. This evidence was held insufficient, and some doubts were expressed as to whether such evidence could be admitted at all. This case is an extreme one; and out of indulgence to the difficult stress which a lost or missing will occasions, it seems fair that the testator's declarations should be admitted, as corroborative, at least, of other proof, for the purpose stated in our text.

ting the oral declarations of the testator to the point that he did or did not understand his will legally revoked.¹

§ 404. **Revocation by Subsequent Will or Codicil.** — Now as to the revocation of a will by a subsequent will or codicil. So long as the disposer of property lives and enjoys testamentary capacity, he may make his will as often as he likes. But, as Swinburne remarks, “no man can die with two testaments, and therefore the last and newest is of force”;² by which we are to understand that the latest will or codicil duly executed, repeals all former wills which dispose of the estate differently, though all should happen to be preserved. The last will excludes *per se* every former disposition of a contrary or inconsistent nature, without requiring that the instrument annulled be destroyed as prudence dictates.

So long as the law permitted wills of personal property to be executed without the solemnities pronounced necessary for devises of land, the subsequent disposition might be less formal than that which it superseded.³ But as legislation, English and American, commonly prescribes at this day, the later will, whether embracing real or personal property or both, must be signed and attested with all the solemnities of the local statute, in order to revoke a former will, or indeed to operate at all.⁴

§ 405. **Subsequent Will does not revoke unless duly executed.** — Of revoking clauses in a will, as well as of instru-

¹ Hoitt v. Hoitt, 63 N. H. 475, with numerous citations.

² Swinb. pt. 7, § 14, pl. 1.

A parol declaration concerning land is revoked by a devise of it. Kelly v. Johnson, 34 Mo. 400.

³ *Supra*, §§ 252, 253; 1 Cas. temp. Lee, 472.

⁴ *Supra*, §§ 252, 253. The Statute of Victoria has abolished in England all distinctions between wills of real or personal property in respect of revocation. There must be “another will or codicil executed in manner hereinbefore required” (*i.e.*, by signature and attestation in presence of two witnesses

at one time) to operate revocation in whole or in part. Act 1 Vict. c. 26, § 20. And see language of the various American codes on this point; their general policy being that a revoking will or writing must be executed and attested like any other will.

Under the Statute of Frauds a slight difference in ceremonial between a devising and revoking will is made in the phraseology; but the difference has proved of no practical consequence, for the subsequent will usually aims to devise as well as to revoke. 1 Jarm. Wills, 167, 168, commenting upon 29 Car. II. §§ 6, 22.

ments, not wills, which may revoke because of their express tenor, we shall speak presently. But apart from such revoking clauses, an instrument which purports to be a will cannot as such revoke a prior existing will, under our modern codes, unless properly signed and witnessed, though it should profess to dispose of the property differently.¹ If it revoke at all, it must be as some other writing within the statute, for it is neither will nor codicil.

§ 406. **If Subsequent Will dispose inconsistently, it is enough.** — A new will or codicil which is duly executed by signature and attestation as the statute requires, operates to revoke a former will wholly or in part, as the case may be, by simply disposing of the estate in an inconsistent manner; and no express words of revocation are necessary.² Yet an express revoking clause is to be recommended for insertion in all wills, so as not to leave the maker's intent to doubtful inference and litigation.³ The later will which thus revokes should be perfect in form and execution; but its operation or non-operation from causes *dehors* the instrument would not affect the question.⁴ It must have been made freely and rationally like any will.⁵

§ 407. **But Later Will does not revoke unless Inconsistent.** — On the other hand, the later will, though well executed, does

¹ Reese v. Court of Probate, 9 R. I. 434; Nelson v. Public Admr., 2 Bradf. 210; 15 Penn. St. 281; Heise v. Heise, 31 Penn. St. 246; Taylor v. Taylor, 2 Nott. & M. 482; 3 MacArth. 153; Boylan v. Meeker, 2 Dutch. 274.

Formerly, a finished will of personalty might be revoked in extreme cases by an unfinished one. 1 Wms. Exrs. 168; 2 Phillim. 51. But this is inconsistent with the general policy of our modern legislation.

For the rule of probate procedure, where a will has been regularly proved, and a later one is afterwards produced which does not revoke the former in terms, see Besancon v. Brownson, 39 Mich. 388.

² Fisher *Re*, 4 Wis. 254; Burden's Estate, 11 Phila. 130; Ludlum v. Otis, 15 Hun, 410; Johns Hopkins Univ. v. Pinckney, 55 Md. 365; 6 Dem. 289; Bobb's Succession, 42 La. Am., 40; 122 Ind. 134.

³ See § 417, *post*.

⁴ Snowhill v. Snowhill, 23 N. J. L. 447; Reade v. Manning, 30 Miss. 308. Thus, a new will may fail of its purpose because the party for whose benefit it is made proves incapable of taking under it; yet it may be set up as a revocation of the former inconsistent will. Laughton v. Atkins, 1 Pick. 535.

⁵ O'Neill v. Farr, 1 Rich. 80.

not revoke the earlier one, as such and without express words of revocation, except by being inconsistent with it. And by the extent of such inconsistency must be measured the extent of the revocation. To operate a total revocation in such a case, the two dispositions must be so plainly inconsistent as to be incapable of standing together.¹ Only a revocation *pro tanto* results where the effect is that of partial inconsistency: it is like making a will and then adding a codicil; the final disposition reading by the light of both instruments together as a corrected whole.² For any number of testamentary instruments, executed at different times, may constitute one's "last will" in legal effect.

But a later will has sometimes, by rather a forced construction, been held to repeal the former totally by implication, where the court can pronounce it as intended for a new, independent and final disposition. The decisions in point are, however, of doubtful authority; and the judges who made them, appear to have laid hold of doubtful words and expressions in the later wills, as importing more clearly than the language warranted, that the testator meant thereby to revoke *in toto*.³ A true will, which revokes completely all one's

¹ 1 Wms. Exrs. 162, correcting the language of Swinburne (cited *supra*, § 404), that "no man can die with two testaments."

² *Masterman v. Maberly*, 2 Hagg. 235; *Stoddart v. Grant*, 1 Macq. H. L. 163; *Lemage v. Goodban*, L. R. 1 P. & D. 57; *Hellier v. Hellier*, 9 P. D. 237; *Laughton v. Atkins*, 1 Pick. 535, 543; *Floyd v. Floyd*, 7 B. Mon. 290; *Brant v. Wilson*, 8 Cow. 56; *Larrabee v. Larrabee*, 28 Vt. 274; *Fleming v. Fleming*, 63 N. C. 209; *Price v. Maxwell*, 28 Penn. St. 23; *Scott v. Fink*, 45 Mich. 241; *Buchanan v. Lloyd*, 1 Atl. Rep. 845; *Johns Hopkins University v. Pinckney*, 55 Md. 365; *Smith v. McChesney*, 15 N. J. Eq. 359.

³ These cases are cited in 1 Wms. Exrs. 163, 164. Thus, in *Plenty v. West*, 1 Rob. 264, the subsequent will disposed of only part of the testator's

personal estate. But Sir H. J. Fust relied greatly upon language therein which described the paper as "my last will." And see *Cutto v. Gilbert*, 18 Jur. 560. But in many instances a paper described as one's "last will and testament" is probated as an addition to a former will, out of a broader regard to the testator's intention. 1 Wms. Exrs. 163, note; 5 Notes Cas. 183, 512; *Lemage v. Goodban*, L. R. 1 P. & D. 57. *Hellier v. Hellier*, 9 P. D. 237, harmonizes the probate and temporal courts on this point.

The appointment or non-appointment of new executors has little real bearing on such issues. 1 Wms. 164, criticising *Plenty v. West*, *supra*; *Henfrey v. Henfrey*, 2 Curt. 468; 4 Moore P. C. 29; *Richard's v. Queen's Proctor*, 18 Jur. 540; *Brown Re*, 1 B. Mon. 56; *Bailey Re*, L. R. 1 P. & D. 628. Yet

former wills by inference, is properly executed and described as a substantive will and not a codicil.

According to the better rule, therefore, where revocation is simply implied from a subsequent will, inconsistent in terms, the revocation will be limited to such terms as are plainly inconsistent; and where a devise or bequest in the former will is clear and free from doubt, the intention to revoke it by the latter should be equally explicit.¹ The governing principle in all such cases is the testator's apparent intention. And one's intention in making a new will may have been to dispose of other property or make new provisions perfectly consistent with the former; or else to thereby revoke *pro tanto* by amendment; it does not follow that a full revocation was intended.²

§ 408. **Intention to revoke must be Immediate, and not Prospective or Dependent.** — The intention to revoke implied in a will must be immediate, and not prospective or dependent, in order to take effect. Thus, a will confined to other property, which intimates an intention to re-dispose of what the first will bequeathed by a codicil to be hereafter made, constitutes no present revocation of the first will.³ And the license formerly granted to wills of personalty informally executed, whereby one's mere instructions for a subsequent will might in an extreme case operate *ipso facto* to revoke an

some of the earlier cases in the ecclesiastical courts seem to have regarded the subsequent appointment of a new executor by will as an implied revocation. 1 Phillim. 412, and cases cited.

On the other hand, where a codicil entirely revokes the will except as to the appointment of executors, the will remains *pro tanto* valid, and both instruments require probate. Newcomb v. Webster, 113 N. Y. 191.

¹ Masterman v. Maberley, and other cases, *supra*.

² The cases sometimes turn upon a very nice construction of phrases which

are supposed to indicate what the testator intended. Thus, a legacy "in lieu" of a former provision may be held to revoke such provision. Brownell v. DeWolf, 3 Mason, 456. So, too, in a bequest to tenants in common, a distinction in effect is taken between the revocation of a gift and of so much of the will as contains the gift. See 1 Jarm. Wills, 170; Harris v. Davis, 1 Coll. 416; Sykes v. Sykes, L. R. 4 Eq. 200; Rife's Appeal, 110 Penn. St. 232.

³ Thomas v. Evans, 2 East, 488; 1 Jarm. 171. Cf. Brown v. Thorndike, 15 Pick. 388.

earlier one,¹ is discountenanced by the policy of modern codes.

§ 409. **Inclination against Revocation; Use of a Codicil.** — The courts incline to so construe doubtful cases as to preserve, wholly or in part, the contents of the prior will rather than pronounce for a total revocation by inference. Where, for instance, the later will only disposes of a portion of the estate, they avoid the ill consequence of partial intestacy;² and where the later paper is styled a codicil, they take this to mean that the intent was to amend and not repeal;³ and in either case the former will is treated as no more than *pro tanto* revoked. In other cases, perhaps, the context may justify a similar construction. But if the later will does not profess to be a codicil at all, and disposes moreover of the whole estate inconsistently with the earlier, a court would violate its duty not to hold that the earlier will was wholly revoked, unless the context supplied good reason for supposing that the testator otherwise intended.⁴

The intention to revoke may be collected from informal expressions, though not from ambiguous ones.⁵ And in case of doubt, provisions by a later will appear to be presumed additional and cumulative, rather than intended as a substitute and by way of revocation.⁶ Even where the literal construction of a codicil might favor the conclusion of a more sweeping revocation, a less sweeping one will be inferred if a fair comparison of will and codicil in all their provisions justifies the conclusion; for no disturbance of the former existing will is to operate from the later one than necessity justifies.⁷

§ 410. **Revocation by Subsequent Will under a False Assumption of Facts.** — Where a testator revokes his existing

¹ 1 Wms. Exrs. 161; 1 Cas. temp. Lee, 509; *Helyar v. Helyar*, 1 Phillim. 430.

² *Freeman v. Freeman*, Kay, 479.

³ *Howard Re*, L. R. 1 P. & D. 636. The usual office of a codicil is to vary or amend a previous will, and not to repeal it. *Supra*, § 7; next c.

⁴ 1 Jarm. Wills, 175; *Henfrey v. Henfrey*, 2 Curt. 468; 4 Moore P. C. 29.

⁵ *Cf. Gordon v. Hoffman*, 7 Sim. 29; *Pilcher v. Hole*, 7 Sim. 208; 1 Jarm. 182.

⁶ 1 Wms. Exrs. 167.

⁷ *Reichard's Appeal*, 116 Penn. St. 232. See *Thomas v. Levering* (Md.) 1891.

Ambiguous language in a codicil does not operate as a total revocation. *Gelbke v. Gelbke*, 88 Ala. 427.

will, through some false or mistaken assumption of facts, which is discoverable from the face of the papers, the revocation does not take effect. As if one should by a later will repeal legacies given by an earlier one to his grandchildren, "they being all dead," when in fact they are living;¹ or should confer benefits upon one described as husband or wife, who turns out not to be legally a spouse by reason of some prior and existing marriage;² or should treat the gift as made to A in the original will when it was made to B.³ This rule regards the testator's intent and the impulse which moved him to dispose as he did; and courts treat the revocation accordingly as a sort of contingent or conditional one, whose condition or contingency has failed;⁴ the intent being deficient, as in other cases of fundamental mistake. Where no mistaken assumption appears, but a testamentary purpose founded upon some recognized doubt or accompanied by a mere misdescription of the person, or stating grounds of whose falsity or truth the testator judged for himself, this rule does not apply.⁵

This non-revocation, we may add, cannot be set up by showing mistakes not discoverable from the face of the testamentary papers; and it is held that not only the mistake must be thus apparent, and what the will of the testator would have been except for the mistake.⁶ The failure of the revocation to take effect, however, appears the same, whether the new will with its false assumption revoked expressly or only by application.⁷

§ 411. **Two Wills of the Same Date, etc.** — Where two contradictory wills are found bearing the same date, or without any date at all, and nothing can be shown to establish rela-

¹ *Campbell v. French*, 3 Ves. 321; ⁵ See 1 Jarm. Wills, 183, citing 10 *Crossthwaite v. Dean*, L. R. 5 Eq. 245. Ad. & El. 228; *Hayes v. Hayes*, 21

² *Kennell v. Abbott*, 4 Ves. 802; N. J. Eq. 265; *Skipwith v. Cabell*, 19 *Doe v. Evans*, 10 Ad. & El. 228. Gratt. 758.

³ *Barclay v. Maskelyne*, 1 Johns. ⁶ *Gifford v. Dyer*, 2 R. I. 99. (Eng.) 124. ⁷ See *Campbell v. French*, 3 Ves

⁴ 1 Wms. Exrs. 173, 174; 1 Jarm. 183. 321.

tionship or priority in one or the other, both must be treated as void, and intestacy is the harsh result.¹ But the court avoids this conclusion if possible, by collecting some consistent scheme of disposition from both papers, or determining their true sequence.²

Where duplicate wills are executed on the same day, the execution of the second operates no revocation of the first; for the intention is, that both shall constitute one and the same will.³ Even where one has executed a later will, wrongly supposing it to be an exact copy of his former one, while in fact it omitted certain essential parts, no revocation of those parts occurs, but both instruments are together entitled to probate.⁴

§ 412. **When Revoking Will cannot be found; Proof of Revocation, etc.** — The execution of a subsequent will of different tenor operates to revoke a former one, notwithstanding the later will be lost or mislaid, or at least cannot be found at the testator's death.⁵ Even supposing the second will destroyed by the testator with the intention of revoking it, he may have meant to die intestate.⁶

But where a will which cannot be produced is relied upon as revoking by implication a former one, its contents should be clearly established.⁷ And the mere fact that a later will was made, by no means justifies the inference that it revoked in effect without proof of its actual contents.⁸ The English temporal courts appear to have insisted upon this doctrine more strenuously than the spiritual tribunals;⁹ but on the

¹ Phipps v. Anglesea, 7 Bro. P. C. 43.

² 1 Jarm. Wills, 175; 1 Wms. Exrs. 166.

³ Odenwaelder v. Schorr, 8 Mo. App. 458. It is not necessary to produce both papers for probate, where a will is executed in duplicate. Crossman v. Crossman, 95 N. Y. 145.

⁴ Birks v. Birks, 34 L. J. 90.

⁵ Legare v. Ashe, 1 Bay, 464. Here parol evidence of contents is admissible within the rule laid down, *supra*, § 402.

⁶ Brown v. Brown, 8 El. & Bl. 876.

But see § 413, *post*, as to reviving a former will by cancelling the later one.

⁷ 1 Wms. Exrs. 162; Cutto v. Gilbert, 9 Moore P. C. 131; Colligan v. McKernan, 2 Demarest, 421; Southworth v. Adams, 11 Biss. C. C. 256.

⁸ Hitchins v. Bassett, 3 Mod. 203; 1 Show. 537, affirmed in Shaw. Cas. Parl. 146.

⁹ Cf. Cutto v. Gilbert, 18 Jur. 560, reversed in 9 Moore P. C. 131; Freeman v. Freeman, 5 De G. M. & G. 704. And see Nelson v. McGiffert, 3 Barb. Ch. 158; Peck's Appeal, 50 Conn. 562.

whole it has been well established, though not without a struggle, that unless the tenor of a later and missing will can be ascertained, by clear secondary evidence of its contents, revocation of the earlier one which still exists uncanceled is not to be inferred when proof of such revocation is wanting.¹

§ 413. **Whether the Revocation of a Later Will can revive an Earlier One.**— But supposing the contents of a later will sufficiently established, the question has long been discussed in courts, English and American, whether the revocation of such later will can *per se* revive an earlier one which remains uncanceled. The conclusion has been variously announced, and the fundamental difficulty appears to consist in trying to spread a net which shall catch the testator's intention each time without moving.

The English common law tribunals laid down a rule, under Lord Mansfield's lead, which has been thought more inflexible than that favored by ecclesiastical courts: viz., to the effect, that if a testator keeps his first will undestroyed and uncanceled, makes a second will virtually or expressly revoking it, and then destroys or cancels the second will only, thus repealing his revocation, the first will thereupon revives and continues in force.² But the ecclesiastical courts announce that in all such cases the testator's intention should be the guide. "The legal presumption," as Sir John Nicholl declares, "is neither adverse to, nor in favor of, the revival of a former, uncanceled, upon the cancellation of a later revocatory will. Having furnished this principle, the law withdraws altogether, and leaves the question, as one of intention purely, and open to a decision either way, solely according to facts and circumstances."³ Even the common law courts have questioned the broadness of the rule as Lord Mansfield

¹ 1 Wms. Exrs. 166; cases *supra*. Where it was known that the second will disposed differently, but in what particulars unknown, or merely that it was styled "last will," this does not establish a revocation. *Ib.*; Goodright v. Harwood, Cowp. 87; 7 Bro. P. C. 344.

² Lord Mansfield in *Harwood v. Goodright*, 1 Cowp. 91; *Goodright v. Glazier*, 4 Burr. 2512.

³ *Usticke v. Bawden*, 2 Add. 125. And see *Moore v. Moore*, 1 Phillim. 412.

first laid it down ;¹ and indeed, it is possible that the eminent judge has not been accurately reported ;² while Sir John Nicholl, on the other hand, though professing that the law was unsettled in his day, gave a cautious preference to presuming against the revival of the former will rather than in favor of it.³

There is a distinction well taken in such cases (which Lord Mansfield may, if misreported, have had in view, though he probably had it not) ; namely, as between a later cancelled will which was merely inconsistent with the former one, and one which contained a clause expressly revoking it. Where the one will was expressly revoked by the other, it seems fairly presumable that the immediate absolute and unequivocal revocation in writing remains unaffected by equivocal acts of parol touching the later instrument ; or, in other words, that if the subsequent will expressly revoke the prior one, a simple cancellation of the latter cannot set up the former one again.⁴ But some good authorities have questioned the soundness of such a distinction ;⁵ though as affecting, at least, the strength of the bias or presumption against revival, it seems an important one, even though controlling evidence of actual intent cannot be shut out.

§ 414. **The Same Subject: Present English Rule.** — In this discrepancy of authorities, the statute 1 Vict. c. 26, undertook, in 1837, to establish a rule for the future. Under § 22 of this enactment it is provided that no will or codicil, or any part thereof, which shall be in any manner revoked, shall be revived otherwise than by the re-execution thereof, or by a codicil executed as required by the act, and showing an inten-

¹ Moore v. Moore, 1 Phillim. 419, where Justice Abbott and Baron Richards appear to question Lord Mansfield's opinion; 1 Wms. Exrs. 179.

² See note to Burr. 2513, 3d. Ed., cited by 1 Wms. Exrs. 178, note. But Mr. Williams disposes of this controversy (which relates to Goodright v. Glazier) by quoting Lord Mansfield's language in Harwood v. Goodright, *supra*.

³ Wilson v. Wilson, 3 Phillim. 554; 1 Hagg. 326. But parol evidence of the actual circumstances is freely admitted to turn the force of any presumption. *Ib.*; Welsh v. Phillips, 1 Moore P. C. 209; 1 Wms. Exrs. 180.

⁴ 1 Powell Dev. (Ed. 1827) 527, 528.

⁵ Jarman's note, *ib.* 529, cited in 134 Mass. 254.

tion to revive the same.¹ This puts an end in England to all discussions of obscure intent on this point, and brings the courts of that country upon harmonious ground which none of them ever occupied before. Since this enactment operated, the uniform rule has been that after the execution of a subsequent will which contains an express revocation, or which by reason of inconsistent provisions amounts to an implied revocation of the former will, such former will cannot be revived by the simple cancellation or destruction of the later will.² No strict distinction is here preserved between an express or an implied revocation of the earlier will by the later one; yet the former mode of revocation best relieves the abstract question of difficulty.³

§ 415. **The Same Subject: American Rule.** — In the United States, a like discrepancy of opinion is found in the several States whose courts have considered the subject; and legislation in many localities resolves the dispute substantially as the English Statute of Victoria has done.⁴ The policy of these enactments being that an earlier will once revoked ought not to be revived by the cancellation of a later will, we may consider Lord Mansfield's theory as in the main disapproved. For even in States whose courts are left without such guidance, we find that, on the whole, the ecclesiastical is preferred to the common-law doctrine. Particularly is that doctrine asserted, where the later will which became revoked contained an express clause of revocation;⁵ and numerous decisions are put expressly on the ground that the

¹ Act 1 Vict. c. 26, § 22; Appendix, *post*.

² *Major v. Williams*, 3 Curt. 432; *Brown v. Brown*, 8 El. & Bl. 876; *Dickinson v. Swatman*, 30 L. J. (N. S.) 84; *Wood v. Wood*, L. R. 1 P. & D. 309.

³ 1 Wms. Exrs. 181.

⁴ Wherever legislation has dealt with this subject, in the several States, it appears to have been thought best to provide against constructive revival of an earlier will by cancellation of the later one. New York, Ohio, Indiana, Missouri, Kentucky, California, Arkansas,

and Virginia are among the States where such enactments have prevailed. See 4 Kent Com. 532; 134 Mass. 256, *per* Allen, J.; *Rudisill v. Rodes*, 29 Gratt. 147; *Beaumont v. Keim*, 50 Mo. 28.

⁵ *James v. Marvin*, 3 Conn. 576; *Simmons v. Simmons*, 26 Barb. 68; *Colvin v. Warford*, 20 Md. 357, 391; *Harwell v. Lively*, 30 Ga. 315; *Bohanon v. Walcott*, 1 How. (Miss.) 336; *Scott v. Fink*, 45 Mich. 241; *Pickens v. Davis*, 134 Mass. 252; 2 Dall. 266, 286, 290; *Flint-ham v. Bradford*, 10 Penn. St. 82.

later will revoked thus, and not by mere implication ;¹ yet leaving no positive assurance that this distinction will be rigidly pursued. If, therefore, a will which was duly executed, and which contained a clause expressly revoking all former wills, be cancelled or destroyed, the preponderance of American opinion is that the former will is not thereby revived, in default at all events, of affirmative evidence that the testator so intended.² But in the absence of statute direction, the courts treat the question of revival as one of intent, to be gathered from all the circumstances.³

¹ *Scott v. Fink* and *Colvin v. Warford*, *supra*. In *Scott v. Fink* the distinction is stated at length, and reference is made to the fact that an express revocation operates at once and unequivocally without being a needful ingredient of the will. But as to the implied revocation which results from the inconsistency of the second will with the first there are prevalent theories in the courts which interfere with its immediate operation. The only chance for the second will here to operate was by its coming to a head as an active will, which it could do only by surviving its maker. "Being the last expression of the decedent and at the same time practically inconsistent with the prior one, the intent to repeal the first by it was to be implied. In case, however, of its being recalled by the testator in his lifetime, it could not, on the theory referred to, be taken to have the effect to do away with its predecessor." 45 Mich. 241. This same distinction is expressed in *Peck's Appeal*, 50 Conn. 562, and *semble* enforced, by comparison with *James v. Marvin*, 3 Conn. 576. This rather fanciful idea is derived from Lord Mansfield in *Goodright v. Glazier*, 4 Burr. 2512. But in that same English case, Mr. Justice Yates puts the principle thus: The first will revives or holds good, because the revocation of it by the second will was itself revocable, and the testator has revoked the revocation by cancelling the second will. *Goodright v. Glazier*, *ib.*

² *Pickens v. Davis*, 134 Mass. 252, and cases cited. Oral declarations made after cancelling the later will are admissible to show whether the testator meant thereby to revive his earlier and still uncanceled one. *Ib.*; § 403; *Hawes v. Nicholas*, 72 Tex. 481.

³ In *Colvin v. Warford*, 20 Md. 357, 391, the court appears to have held that the cancellation of a revoking will is *prima facie* evidence of an intention to revive the previous will, but the presumption may be rebutted by evidence of the attending circumstances and probable motives of the testator. The rule of the English ecclesiastical courts points, however, the other way, as our text indicates, or else to a non-presumption. See 1 Wms. Exrs. 179. The intention to revive the first will when cancelling the second, is indeed open to proof, and even to oral proof; but the bare fact that the first will was not destroyed, while the second was, affords no sufficient proof, especially if the second will contained a clause of express revocation.

"The clause of revocation," observes Allen, J., in a learned exposition of this subject, "is not necessarily testamentary in its character. It might as well be executed as a separate instrument. The fact that it is inserted in a will does not necessarily show that the testator intended that it should be dependent on the continuance in force of all the other provisions by which his property is disposed of. It is more reasonable and

On the other hand, there are a few States in which Lord Mansfield's rule has been upheld; so that the earlier will revives upon cancellation of the later one.¹

§ 416. Reference of Codicil to Either of Two Wills. —

Although a later and inconsistent will repeals a prior one without a revoking clause, it does not preclude a testator by appropriate writing from reinstating the former one in a contingency. Thus, where the testator has preserved two such wills, he may make a still later codicil, while uncertain which of these two ought to take effect as his will, meaning such codicil, however, to attach to the earlier will in one alternative and to the later one in the other; and supposing the codicil to express this intention clearly and properly, no artificial rules of revocation can deprive the intention of legal effect.²

§ 417. Express Revocation by Later Will, etc. — We are now brought to consider the express revocation of an earlier

natural to assume that such revocatory clause shows emphatically and conclusively that he has abandoned his former intentions, and substituted therefore a new disposition of his property, which for the present, and unless again modified, shall stand as representing his wishes upon the subject. But when the new plan is in its turn abandoned, and such abandonment is shown by a cancellation of the later will, it by no means follows that his mind reverts to the original scheme. In point of fact, we believe that this would comparatively seldom be found to be true. It is only by an artificial presumption, created originally for the purpose of preventing intestacy, that such a rule of law has ever been held. It does not correctly represent the actual operation of the minds of testators in the majority of instances. The wisdom which has come from experience, in England and in this country, seems to point the other way." 134 Mass. 256.

Where a testator executes a second will, supposing at the time that the first will was lost, and he subsequently finds

the first and destroys the second, declaring that he prefers the first, those circumstances establish his intention. *Marsh v. Marsh*, 3 Jones L. 77. But where one destroys his later will with the distinct purpose of making another one, this does not revive an earlier one found among his papers, no third will, in fact, having been made. *McClure v. McClure*, 86 Tenn. 173.

If a testator after holding three wills in suspense, each containing its revoking clause, and each properly executed, decides to keep the second and destroy the other two, and acts accordingly, the second will should be admitted to probate. *Williams v. Williams*, 142 Mass. 515.

¹ *Taylor v. Taylor*, 2 Nott & McC. 482; *Randall v. Beatty*, 31 N. J. Eq. 643 (a case of express revocation). As to second wills not expressly revoking, this doctrine finds approval in *Peck's Appeal*, 50 Conn. 662, which construes a local statute.

² *Bradish v. McClellan*, 100 Penn. St. 607.

will by words or a clause contained in the later one. This, as already appears, furnishes a more prompt and positive mode of repealing than simply to provide differently by the new will and trust to inferences. Indeed, no well-drawn testament omits at the present day a clause of revocation; whether expressed so as absolutely to revoke all wills made by the testator at any former time, or in a partial sense, as where a codicil revokes the former will so far as inconsistent therewith, and in other respects ratifies and confirms it.¹ Words and clauses of express revocation operate according to their obvious tenor, and strengthen the proof disclosed by inconsistent provisions contained in the new will.

As a rule, a general clause of revocation contained in the later will operates as expressed, namely, so as to revoke all prior testamentary acts of the testator.² But if the later will appears on its face to have subserved some purpose which fails, or to have proceeded upon a false assumption of facts, the new disposition failing, the express revocation is carried down with it, on the theory that the testator intended the revocation clause as an ingredient of the new will and not to operate independently of it.³ So, too, a declaration of intention to revoke in the future, or contingently, or with whatever shows a wavering, deliberative, or unsettled purpose in the testator's mind, cannot be deemed a present express revocation.⁴ And it is laid down as a canon of construction that what is once clearly given must be clearly taken away or cut down, in order to be effectually taken away or cut down at all.⁵

Whether an express clause of revocation shall operate totally or partially, or whether it is imperative or the reverse, is a question of construction, and often a nice one, to be gath-

¹ See forms in Appendix, *post*.

² In an extreme case this effect appears to have been restrained by proof that the testator had not intended it to apply to a particular paper. 1 Wms. Exrs. 16, 186.

³ *Onions v. Tyrer*, 7 Ves. 379; *Campbell v. French*, 3 Ves. 321; *supra*, § 410.

⁴ *Cro. Jac.* 497; 1 Wms. Exrs. 183;

Thomas v. Evans, 2 East, 448; *Brown v. Thorndike*, 15 Pick. 388; *Semmes v. Semmes*, 7 Harr. & J. 388; *Hamilton's Estate*, 74 Penn. St. 69; *Rudy v. Ulrich*, 69 Penn. St. 177. But *cf.* *Walcott v. Ochterlong*, 1 Curt. 580.

⁵ *Doe v. Hicks*, 8 Bing. 479; 1 Cl. & F. 20; *Kiver v. Oldfield*, 4 De G. & J.

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ered from a study of all the instruments concerned, with a view of discovering the testator's intention.¹

§ 418. **The Same Subject.** — The effect of writings not testamentary whose purport is to revoke will presently appear. But in order to make the revocation clause operate which a new will contains, the will itself should be properly executed according to the statute requirements;² and, of course, it should be the product of a free and rational mind.³ For there must exist not only testamentary capacity in such a case, but the testamentary execution; since a testator is presumed not to have intended revoking his former will except for the purpose of substituting the later one with the clause in question.

If, however, the second will be properly executed by one of suitable capacity, the clause of revocation contained therein will operate, even though the second will should fail of its intended effect by reason of the incapacity of the beneficiary named in it, or any other matter *dehors* the will.⁴ And even though the revoking will should make no disposition of the property disposed of by the will revoked, the clause of revocation will have its full effect.⁵ On the other hand, where the revoking will is found to be invalid on the ground of fraud or undue influence, or of mental incapacity, the clause of revocation which it contains cannot operate apart.⁶

§ 419. **Express Revocation by Other Writing.** — The revoking instrument above described is executed as a will, being of a testamentary character and generally a mere clause contained in the new testamentary disposition. Such an instru-

¹ See next c.; *Cookson v. Hancock*, 2 My. & Cr. 606; *Van Wert v. Benedict*, 1 Bradf. 114.

² *Laughton v. Atkins*, 1 Pick. 543; *Nelson v. Public Admr.* 2 Bradf. 210; *Heise v. Heise*, 31 Penn. St. 246.

³ *O'Neill v. Farr*, 1 Rich. 80; *Rudy v. Ulrich*, 69 Penn. St. 177.

⁴ *Tupper v. Tupper*, 1 Kay & J. 665; *Price v. Maxwell*, 28 Penn. St. 23; *Hairs-*

ton v. Hairston, 30 Miss. 276; *Laughton v. Atkins*, *supra*. And see *Pringle v. McPherson*, 2 Brev. 279. An express revocation will prevail, even though the object of the new will fails as being against public policy. 5 Jones Eq. 46.

⁵ *Thompson Re*, 11 Paige, 453; *Bayley v. Bayley*, 5 Cush. 245.

⁶ *Rudy v. Ulrich*, 69 Penn. St. 177; *Rich v. Gilkey*, 73 Me. 595.

ment requires probate.¹ But our wills acts recognize the right of express revocation by some other writing, not strictly testamentary; while under the common law, an unattested and even unsigned paper might be set up to repeal a will, provided only the suitable, free, and rational intent was therein disclosed.

But Anglo-Saxon law has long cherished the policy that a transaction by solemn instrument ought not to be subverted by an instrument less solemn. And, accordingly, the same Statute of Frauds which ordained that devises of land should not be good unless formally signed by the testator and attested in the presence of three witnesses, provided further that devises should not be revoked in writing save under substantially the same conditions; so that whether by will or some other distinct writing, the signature and the three witnesses were alike indispensable.² This principle of legislation having been early adopted in the American colonies, we have only to consider the effect of revocation by informal writing upon a testator's personal property, and even here it is American rather than English precedents that we find in point.³

§ 420. **The Same Subject.**—Unlike the devise of lands, therefore, a will of personal property alone might be revoked

¹ *Laughton v. Atkins*, 1 Pick. 535; *Rudy v. Ulrich*, 69 Penn. St. 177.

² Act 29 Car. II. c. 3, § 6.

This same statute, § 22, provides that "no will in writing concerning any goods or chattels or personal estate shall be repealed, nor shall any clause, devise or bequest therein be altered or changed by any words, or will by word of mouth only, except the same be in the life of the testator committed to writing, and after the writing thereof read unto the testator, and allowed by him, and proved to be so done by three witnesses at the least." See 1 Jarm. Wills, 167, 168,

³ 1 Jarm. Wills, 167, 168. The provision of § 22 of the above statute was not so generally incorporated in American legislation as that of § 6.

Where it appears to have been the testator's intention that all after-acquired property shall pass by his will, his conveyance of all the estate previously devised, by a trust deed, not attested by a sufficient number of witnesses to give it a testamentary character, but containing a power of revocation which is subsequently exercised so that the title reverts in the testator, does not operate as a revocation of the will; and upon the reversion of the title in the testator, the estate is subject to the will, as before, and the interest of the devisees exists as if no conveyance had been made. *Morey v. Hoitt*, 63 N. H. 507. And see § 427 *post*.

by an unattested, or even unsigned, writing which made the intention clear; and even where a will disposed of real and personal estate together, a similar instrument would take effect upon the gifts and bequest of personalty, though otherwise inoperative.¹ To give this effect, no peculiar form of words was requisite. The testator might in some convenient part, usually at the foot of the original will, write "this will is hereby cancelled," or "this will is invalid," and if he signed it, so much the better.² A single word written on the will which manifests an intention to annul it, so courts have ruled, effects a repeal.³ Partial revocation, too, may be manifested by writing suitable words across or against the legacy to be cancelled.⁴ And every paper in the form of a will, but not properly executed as such, has been sometimes treated as sufficient for an express revocation, consistently with the local statute concerning devises of land;⁵ though, properly speaking, that which fails as a will from imperfect execution, ought not to operate separately in its revoking clause when intended as a will.⁶

¹ *Brown v. Thorndike*, 15 Pick. 388.

Where the local law requires an express revocation of real estate to be formally witnessed like a will, but not a revocation of personal property, it may happen that the testator has disposed of both real and personal property by a will duly attested, and then by an unattested writing purports to revoke his will utterly. Here the situation of his property at the time of such revocation is well inquired into, with the aid, if need be, of evidence extrinsic to the will itself. For a will refers to the condition of one's property when it was made, while a revocation made long after operates upon the property then to be affected, which may be very different in amount and character. Should it prove that when the revocation was written the testator no longer owned real estate, any writing sufficient to revoke a will of personal property alone would revoke

completely. *Brown v. Thorndike*, 15 Pick. 388.

² *Warner v. Warner*, 37 Vt. 356; *Johnson v. Brailsford*, 2 Nott & McC. 272; *Semmes v. Semmes*, 7 Harr. & J. 388; *Witter v. Mott*, 2 Conn. 67. To write "obsolete" on the margin of the will is not enough. 2 W. & S. 455.

For instances in which a writing neither signed nor attested may revoke, see *Clark v. Ehorn*, 2 Murph. 235; *Glasscock v. Smither*, 1 Call. 479.

³ *Evans's Appeal*, 58 Penn St. 238; 1 Demarest (N. Y.) 484.

⁴ See *supra*, § 397.

⁵ *Clark v. Ehorn*, 2 Murph. 235.

⁶ See *supra*, § 418; *Glasscock v. Smither*, 1 Call. 479; *Laughton v. Atkins*, 1 Pick. 535, 543; *Heise v. Heise*, 31 Penn. St. 246; *Reese v. Court of Probate*, 9 R. I. 434; *Stickney v. Hammond*, 138 Mass. 116.

§ 421. **The Same Subject.** — It is of course well settled that the declaration of an intent to revoke by some future act amounts to no actual revocation.¹ But the terms of any writing which imports a revocation should be construed according to its obvious intent and the subject-matter rather than the strict phraseology in which it is couched; hence hypothetical words in such instruments may well consist with the idea that a new will is proposed, and yet that the writing in question shall operate notwithstanding as an actual and present revocation without waiting for it.² If an instrument is to take effect only on the happening of an event which does not transpire, it cannot revoke a will already executed and existing.³

§ 422. **The Same Subject: Latest Legislation.** — But under the latest legislation, English and American, these informal, unattested writings which purport to revoke are generally abolished. As public opinion in both countries has advanced to the requirement that all wills without distinction of the property to which they relate shall be regularly and uniformly signed and attested, so has the disposition grown to admit of no express revocation by writings less solemn. Upon this newly extended rule of policy rests the modern Statute of Victoria and most local enactments in the United States now in force.⁴ Revocation under these statutes may be by ex-

¹ Cro. Jac. 497; *Thomas v. Evans*, 2 East, 487; *Brown v. Thorndike*, 15 Pick. 388; *supra*, § 417. Thus, an indorsement on a will which indicates the purpose to alter or modify it at a future day, is no revocation. *Ray v. Walton*, 1 A. K. Marsh, 71.

² *Brown v. Thorndike*, 15 Pick. 388, 408. Here the testator wrote on his will: "It is my intention at some future time to alter the tenor of the above will, or rather to make another will; therefore, be it known, if I should die before another will is made, I desire that the foregoing be considered as revoked and of no effect." This was held to constitute a present revocation, and not the

declaration of an intent to revoke by some future act. But *qu.* was it not rather a revocation to operate contingently or upon a condition subsequent which took actual effect; and may not an express revocation thus qualified, and not strictly dependent upon some future act of revocation, be good?

³ *Hamilton's Estate*, 74 Penn. St. 69; 69 Penn. St. 177.

⁴ See Act 1 Vict. c. 26, § 20; Appendix. Many American statutes require in such case "some other writing signed, attested, and subscribed in the same manner that is required in the case of a will." See Mass. Pub. Stats. (1882) c. 127, § 8; *Noyes's Will*, 61 Vt. 14.

press writing testamentary or not testamentary ; but in either case and with reference to real and personal property alike, the instrument must be executed with the formalities prescribed for a will ; it must be signed by the testator and attested by a stated number of witnesses. The mere preparation of a new will because of dissatisfaction with the former one, can under such a policy operate no revocation, where the testator died before the new will could be executed.¹

A notable consequence of such legislation is, that signed and attested writings which expressly revoke are in some instances wills, requiring probate as such ; and in others, writings which are no wills, nor admissible to probate ; the line of distinction, however, being sometimes difficult to trace.² Simple words of repeal and cancellation written upon a will may still have the force of an express revocation as formerly ; not, however, unless signed and attested as the local statute directs.³

§ 423. **Parol Evidence of Intention to revoke.**—Parol evidence of an intention to revoke or change one's will has been admitted in cases where the papers themselves left the

¹ Voorhis' Will (N. Y.) Am. Dig. 1889.

² Lord Penzance found this difficulty when construing 1 Vict. c. 26, in its 20th section. A testator at the foot of his will wrote a memorandum in effect : "This will was cancelled this day," and duly executed it in the presence of two witnesses. This, it was held, was "some writing" under the statute, and not entitled to probate as a will. *Fraser's Goods*, L. R. 2 P. & D. 40. But, shortly before, Lord Penzance had dubiously admitted to probate a similar memorandum, duly executed as a will, which added the words "and as yet I have made no other" [will]. *Hicks, Goods of*, L. R. 1 P. & D. 683. Here the memorandum did more than to revoke ; and his lordship distinguished between (1) a will or codicil and (2) "some writing," the former of which alone admitted of probate.

See also *Rudy v. Ulrich*, 69 Penn. St.

177, which pursues a like distinction ; *supra*, § 296.

³ *Gugel v. Vollmar*, 1 Dem. (N. Y.) 484. Here the attempt was to revoke part of the will. In a late English case, under the Act of Victoria, a codicil was considered revoked by erasure and a writing signed by the testator and two witnesses to the effect that they had witnessed the erasure. *Gosling's Goods*, 11 P. D. 79.

Under a local statute which requires a will and a written revocation thereof to be executed with the same formalities, such revocation must be established by the same kind and measure of evidence as the probate of a will requires. *Noyes's Will*, 61 Vt. 14. See also *Burns v. Travis*, 117 Ind. 44.

In certain States where holograph wills are favored, an attested will not written by the testator may be revoked by his holographic codicil. 78 Cal. 477.

point in doubt.¹ And if it be uncertain from the face of the instruments whether substitution was intended or something additional by way of gift, the testator's purpose may be cleared by evidence *aliunde*.² But, in general, parol evidence of intent is not admissible unless there is such doubt and ambiguity on the face of the papers as requires extrinsic evidence to explain them.³

§ 423 *a*. **No Revocation by an Instrument intended to Confirm.**—A will is not revoked, of course, by a subsequent instrument which was intended to confirm it; as for example, by a French donation *inter vivos*, which although adding in effect no strength to the testamentary disposition was intended to assure it.⁴

§ 424. **Revocation by Inference of Law; Effect of subsequent Marriage.**—Finally, as to revocation of a will by inference of law. The most striking instance under this head is afforded by the marriage of the testator. If a woman makes a will and afterwards marries, her will is revoked by force of the marriage. This has been the time-honored rule of the common law; resting not upon mere presumption, but upon the material change which marriage works in the circumstances and condition of every woman, and the new interests she sustains by the very act of taking a husband.⁵ This change of condition was doubtless greater under the old rules of coverture which placed the wife under her husband's protection, disabled her from disposing by will or contract without his sanction, and cast her property into a mould convenient for giving the husband the chief control if not the ownership;⁶ yet, by the better opinion (though various States construe to the contrary), it operates to this very day, as a legal revocation, and justly so, despite the new privileges with which equity and modern legislation may have seen fit

¹ Jenner v. Finch, L. R. 5 P. D. 106.

² Methuen v. Methuen, 2 Phillim. 416.

³ Thorne v. Rooke, 2 Curt. 799. See as to ambiguities Part VI. *post*.

⁴ Aubert's Appeal, 109 Penn. St. 447.

⁵ 4 Co. 60 b; Doe v. Staple, 2 T. R.

667, 695; 2 P. Wms. 624; Hodsdon v. Lloyd, 2 Bro. C. C. 544; Long v.

Aldred, 3 Add. 48; Warner v. Beach, 4 Gray, 162; Carey Re, 49 Vt. 236.

⁶ Schoul. Hus. and Wife, §§ 86-89.

to clothe her.¹ In truth, modern experience so justifies the doctrine that marriage shall operate as a revocation, if, at all events, no antenuptial arrangement, no provision in view of the marriage has entered into such a will, that, instead of exempting the wife, legislation now inclines to extend the rule to the husband, by way of equalizing the privileges of the sexes. A man's will, by the older policy of our law, was not revoked by his subsequent marriage at all;² but late statutes in England and several American States give marriage that absolute effect.³ Either spouse may or may not, under such a policy,

¹ *Brown v. Clark*, 77 N. Y. 369; *Swan v. Hammond*, 138 Mass. 45; *Blodgett v. Moore*, 141 Mass. 75; 142 Mass. 242. It is suggested that every will ought to be considered ambulatory; and if a woman cannot by law revoke or make a new will during coverture, her former will made as a *feme sole* would be irrevocable unless the law thus revoked it for her. But this argument does not cover the whole case; for the new concession of testamentary favors to the wife by modern statute does not change the rule of the text. 1 Wms. Exrs. 192. In fact the doctrine has a deep foundation in public policy and knowledge of human nature.

But in Rhode Island the marriage of a *feme sole* testatrix was treated (contrary to rule) as operating only a presumptive revocation of her will. *Miller v. Phillips*, 9 R. I. 141. And in New Jersey and Illinois a woman's marriage was held not to revoke her previous will. *Webb v. Jones*, 36 N. J. Eq. 163; *Tuller Re*, 79 Ill. 99. See also *Noyes v. Southworth*, 55 Mich. 173; *Fellows v. Allen*, 60 N. H. 439; *Ward's Will*, 70 Wis. 251; *Hoitt v. Hoitt*, 63 N. H. 475; *Hunt's Will*, 81 Me. 275. See also the line of argument pursued in *Morton v. Onion*, 45 Vt. 145. In *Carey Re*, 49 Vt. 236, it is held that a woman's will of personalty is revoked by her subsequent marriage, while her devise of real estate is not, under the Vermont statutes. Where our courts, under the influence

of the late marital legislation, treat the wife's will as not *per se* revoked by her marriage, their main object seems to be to put wife and husband upon an equal plane in this respect. But that effect would be accomplished by causing marriage to operate a revocation correspondingly of the husband's will.

A woman's will is not revoked by her subsequent marriage, where it was made with her intended husband's consent and made part of an antenuptial arrangement between them. *Stewart v. Mulholland*, 88 Ky. 38; *Osgood v. Bliss*, 141 Mass. 474.

² As to the old law concerning revocation of a man's will by marriage and the birth of a child, see next section.

³ This subject is now set at rest in England by the new Statute of Wills, which enacts that "every will made by a man or woman shall be revoked by his or her marriage," etc. 1 Vict. c. 26, § 18; Appendix, *post*. See 15 P. D. 111, 152. Among the American States whose legislation is of the same general purport, may be mentioned Rhode Island, Pennsylvania, Virginia, West Virginia, North Carolina, Connecticut, Georgia, Kentucky, Illinois and California. See 1 Jarm. Wills, 122, Bigelow's note; *McAnnulty v. McAnnulty*, 120 Ill. 26; *Ellis v. Darden*, 86 Ga. 368; *Stimson Am. Stat. Law*, § 2676.

In Connecticut a testator married before the legislature enacted that marriage should revoke a will. He had made

prove disabled from making a new will at pleasure;¹ but at all events the will made before marriage fails, as ought every disposition in legal and moral derogation of new conjugal rights, which was not founded in a fair and open treaty and antenuptial settlement between the parties contemplating a marriage.²

The survival of the spouse who disposed by will before or during marriage does not of itself affect the validity of such testament.³

§ 425. **The Same Subject: Marriage and Birth of Child.**—Unequally as the old common law treated husband and wife in respect to their wills, a rule, borrowed from the civilians, has for at least two centuries reduced the difference of their condition; namely, that if the husband not only married but had a child born to him after making his will, a revocation should be implied.⁴ And the same rule was afterwards extended to marriage and the birth of a posthumous child.⁵ In applying such a rule, the ecclesiastical courts appear to have long regarded the case as one of presumption merely, and subject, after all, to what, on the whole, the testator might be shown to have actually intended.⁶ But the common law tribunals, impressed more deeply by the justice of such a policy and the analogy of the wife's condition, solemnly decided that the principle was one of legal inference, inde-

a will before marriage, which he told his wife he would destroy, but he did not do so. It was held that, inasmuch as the act should not be deemed retrospective, he had not revoked his will. *Goodsell's Appeal*, 55 Conn. 171.

¹ As to the disability of a married woman in this respect, see *supra*, §§ 45-64.

² Schoul. Hus. and Wife, § 348; 87 Cal. 643.

³ *Clough v. Clough*, 3 Myl. & K. 296; *Long v. Aldred*, 3 Add. 48; *Trimmell v. Fell*, 16 Beav. 537. See c. 3, *post*.

⁴ This rule is of modern origin, so far as English law is concerned. It is found in Inst. l. 2, tit. 13. The first reported decision in English courts is *Overbury*

v. Overbury (1682), 2 Show. 242; *Emerson v. Boville*, 1 Phillim. 342, and citations. It was subsequently adopted in the common-law courts (1771) in *Christopher v. Christopher*, 4 Burr. 2171, 2181, note. See 1 Wms. Exrs. 193. The American decisions under this head are numerous. See *Brush v. Wilkins*, 4 Johns. Ch. 506; *Warner v. Beach*, 4 Gray, 163; *Jacks v. Henderson*, 1 Desaus. 543; *Tomlinson v. Tomlinson*, 1 Ash. 224; 4 Kent Com. 527.

⁵ 1 Wms. Exrs. 193; 1 Jarm. Wills, 123; 4 Kent Com. 522; *Doe v. Lancashire*, 5 T. R. 49; *Hart v. Hart*, 70 Ga. 764; 11 Phila. 110.

⁶ Wms. Exrs. 194; 1 Phillim. 473; 1 Hagg. 711.

pendently altogether of what the party himself might have intended.¹

Modern legislation robs this topic of its former prominence in the law of testamentary revocation.² But as numerous States still adhere to the conjugal distinction, we may briefly observe one or two salient points of this doctrine. Marriage alone, or the birth of a child alone, did not operate to revoke the testator's will; both conditions must have succeeded his act of disposition; and hence the birth of his posthumous child was held by the common law courts not to repeal a will made by the husband during marriage.³ Here, however, the ecclesiastical rule of regarding one's intention had its advantage; for other circumstances might afford a handle for inferring that a revocation was really meant;⁴ nor did such courts positively assert that a marriage subsequent to the will was in every case indispensable.⁵

Whether the order of events, marriage and birth, is here of material consequence, the cases do not clearly decide.⁶ But at all events, the rule of revocation would apply all the same, whether the testator who re-married was a widower when he executed the will in question, with children by a former wife

¹ *Marston v. Fox*, 8 Ad. & E. 14, which all the judges of England assembled to decide, Lord Denman being absent. This was a case of real estate; and it may partially explain the contradictory opinions held by spiritual and temporal judges on this point, that the Statute of Frauds excluded parol evidence of intent as much as possible where devises were concerned; while wills of personal property (those with which the spiritual courts dealt) were quite unencumbered with such provisions. 1 Wms. Exrs. 196. All this discrepancy now disappears under the Statute of Victoria, wherever that statute operates. See, further, *Israell v. Rodon*, 2 Moore P. C. 51.

² *Supra*, § 424.

³ *Wellington v. Wellington*, 4 Burr. 2171; *Doe v. Barford*, 4 M. & Sel. 10; 4 Kent Com. 523, and cases cited;

Verby v. Verby, 3 Call. 357; *Havens v. Van Den Burgh*, 1 Denio, 27.

⁴ 1 Wms. Exrs. 197; 1 Jarm. Wills, 124; *Johnston v. Johnston*, 1 Phillim. 147.

⁵ 1 Wms. Exrs. 197, 198. In *Johnston v. Johnston*, 1 Phillim. 447, Sir John Nicholl puts the moral obligation strongly as respects the birth of issue after making a will, and concludes that the concurrence of subsequent marriage should not always be considered essential. But the real difficulty seems to be that the new moral obligation arises when a man takes a wife and before his child is born.

⁶ See 1 Jarm. Wills, 124. *Gibbons v. Caunt*, 4 Ves. 848, favors the conclusion that the order of events makes no difference; and hence that the rule is satisfied by the birth of the child subsequent to the will, by a first wife, followed by the testator's re-marriage.

for whom the will had provided, or an unmarried man, so far as his personal estate was concerned.¹ And we should remember that revocation of a will, under any such circumstances, could work no greater hardship than to bring about a descent and distribution of the estate under the just and politic rules which the law prescribed for intestacy.²

§ 426. **The Same Subject.** — But the rule of implied revocation in such cases does not operate where the will itself has provided for the future wife and child;³ nor, as it appears, unless the entire estate is thereby disposed of to their utter exclusion and prejudice;⁴ neglect of a moral obligation being the point of inquiry, rather than what the testator had intended. But, as we have seen, the courts did not harmonize upon the underlying principle; the ecclesiastical tribunals seeking, on the one hand, in the light of circumstances and the testator's own conduct and declarations, to interpret his purpose; courts temporal, on the other, pronouncing the revocation absolute, where duty compelled, regardless of one's intention.⁵

In this country the rule of judicial construction is greatly affected by local statutes on this subject. Some States, as we have seen, make the will of man or woman absolutely revoked (as in England) by his or her marriage;⁶ in others the older rule of law still prevails that no revocation of a man's will occurs without subsequent marriage and birth of a child. Whether revocation should operate, however, in this

¹ *Havens v. Van Den Burgh*, 1 Denio, 27. As to land and the rule of the "heir apparent" in England, see *Sheath v. York*, 1 Ves. & B. 390.

² Subsequent marriage and the birth of a child concurring, the will became revoked; and though the child should afterwards die, the will was not revived without some new act or recognition on the testator's part, by way of giving it effect. *Emerson v. Boville*, 1 Phillim. 342.

³ *Kenebel v. Scrafton*, 2 East, 530.

⁴ *Kenebel v. Scrafton*, 2 East, 541;

Brady v. Cubit, Dougl. 40; *Marston v. Fox*, 8 Ad. & El. 570. *Mansfield, Ellenborough and Tindal* were in accord on this point. And see 4 Kent Com. 621; *Havens v. Van Den Burgh*, 1 Denio, 27; *Jackson v. Jackson*, 2 Penn. St. 212.

⁵ *Supra*, § 425; *Marston v. Fox*, 8 Ad. & El. 14; *Fox v. Marston*, 1 Curt. 494. But the preceding note indicates that temporal courts were reluctant to enforce their own sweeping rule of revocation unless the breach of duty was complete.

⁶ *Supra*, § 424.

latter case as a legal presumption or a mere presumption of fact open to rebutting proof, is not positively and uniformly settled; but the local enactment guides frequently the favored conclusion.¹ Children born after the making of a will, posthumous or otherwise, are found the subject of still broader enactments, as for instance in most of the New England and Middle States, Ohio and Indiana; but, on the whole, the policy of such statutes is only to revoke the will so far as to let them in, when otherwise unprovided for, to the share which would have fallen to them in case the father had died intestate.² Many American codes go still further, and supply the same relief to all children and their legal representatives

¹ See the various statutes, those of New York and Alabama, for instance; while some States appear to follow the rule still on common law principles. The Georgia statute speaks of marriage or the birth of a child as revoking. 10 Geo. 79; *Deupree v. Duepre*, 45 Ga. 415. Various other local peculiarities are noticeable. Thus, the New York code makes the case one where a will disposes of the whole estate; subsequent marriage and birth of a child follows, and the wife or issue survives the testator. If the will shows an intention not to make any provisions, revocation is avoided. 2 N. Y. Rev. Stats. 64, § 45; 4 Kent Com. 526, 527. In Virginia and Kentucky a child born after the will, if the testator had no children before, revokes, unless such child dies unmarried or an infant; but if one had children before, the after-born children, unprovided for, work only a revocation *pro tanto*. 4 Kent Com. 526.

For the rules of various States, see *Edwards's Appeal*, 47 Penn. St. 144; *Morse v. Morse*, 42 Ind. 365; *Negus v. Negus*, 46 Iowa, 487; 1 Jarm. Wills, 129, Bigelow's note. An expression of confidence in one's will that the child to be born will be reared honorably by the testator's wife does not prevent the legal revocation from operating. *Walker v. Walker*, 34 Penn. St. 483. Under the

Iowa statute the birth and recognition of an illegitimate child revokes a will previously executed. *Milburn v. Milburn*, 60 Iowa, 411. But *cf. Kent v. Barker*, 2 Gray, 535. The mere marriage of the testator does not revoke under the Texas statute. *Morgan v. Davenport*, 60 Tex. 230. Subsequent adoption of a child is held no revocation in Indiana. *Davis v. Fogle*, 124 Ind. 41. A Pennsylvania statute of 1833 renders a man's will made before marriage inoperative either as to the wife or the after-born children not provided for; thus establishing only partial intestacy in either case. 121 Penn. St. 1.

In short, statute expressions vary so greatly in America, that it seems impossible to extract from our cases a uniform doctrine.

² This provision is an absolute one, as such statutes are commonly worded, and the revocation is *pro tanto*, at least, regardless of what the testator may have intended. *Waterman v. Hawkins*, 63 Me. 156; *Knotts v. Stearns*, 91 U. S. 638; *supra*, § 20. But if the will discloses, without the aid of extrinsic evidence, an intention not to provide, some of these acts appear to avoid a legal revocation. See also *Coudert v. Coudert*, 43 N. J. Eq. 407; *Rhodes v. Weldy*, 46 Ohio, 234; *Ward v. Ward*, 120 Ill. 111.

for whom the paternal will makes no provision, and who have had no advancement during the parent's life, unless the omission is shown to have been intentional.¹ Under legislation like this last, intention and not moral obligation becomes plainly the ultimate criterion; and parol evidence may explain whether a child was omitted intentionally or through inadvertence.²

§ 427. **Other Cases of Implied Revocation; Alteration of Estate, etc.**—The books state other cases of revocation implied by law; not, however, without a vague extension of the word "revocation" beyond that genuine repeal of a testamentary instrument to which it is more properly confined.³ Altera-

¹ *Supra*, § 20. As to an adopted child, see 89 N. C. 441.

² Parol evidence is admissible to show whether the omission was intentional or not; the right being reserved to a parent to disinherit his own offspring at discretion. *Bancroft v. Ives*, 3 Gray, 367; *Wilder v. Thayer*, 97 Mass. 439; *Lorings v. Marsh*, 6 Wall. 337. The intention is sometimes shown by the will itself. *Prentiss v. Prentiss*, 11 Allen, 47. But the burden of proof is upon those who set up an intentional omission. *Ramsdill v. Wentworth*, 106 Mass. 320. The later acquisition by the testator of additional property affords no reason for not applying the usual rule that subsequent marriage and birth of a child revokes. *Baldwin v. Spriggs*, 65 Md. 373.

An antenuptial provision, under a settlement, in favor of wife and future issue may prevent that revocation which the statute imports. *Gay v. Gay*, 84 Ala. 38; *supra*, § 424. And as to non-revocation by marriage alone, where a will made before marriage expressly provided for the intended wife, see *Fidelity Trust Co.'s Appeal*, 121 Penn. St. 1.

Under the West Virginia code, where a married woman, having no children, devises all her estate to her husband, and afterwards has issue who survive

her, the will does not take full effect. *Cunningham v. Cunningham*, 30 W. Va. 599.

³ 1 Jarm. Wills, 147 *et seq.*; where a chapter is devoted to "revocation by alteration of estate," with a considerable exposition of the old law on this subject.

Notwithstanding the provisions of the Statute of Frauds on the subject of revocation, it has been held that a will may be revoked by implication or inference of law. "Among these implied revocations is any act of the testator which alters the estate or interest held by him in the lands devised at the date of the will; as for instance, a conveyance of the same, or a valid contract to do so. The will takes effect only at the death of the testator. Real property acquired after making the will goes to the heirs. [But see *supra*, §§ 28, 29.] If, therefore, the testator is not seized at the time of his death, of the same estate or interest in the premises that he was at the time of making his will, the same does not pass by the devise, but goes to the heir. This is held either upon the ground that the alteration of the estate is evidence of a change of purpose on the part of the testator, or more properly, that it works a revocation of the will by depriving the testator of the estate devised, and

tion of one's estate is particularly dwelt upon in this connection. If a will devises nothing but a particular piece of land, and the testator afterwards sells that land, a revocation of the devise may be implied; and so if a testament simply bequeaths specific chattels which are otherwise disposed of during his life, there remains, at all events, nothing for the will to operate upon.¹ But one's estate may over and over again change in value and specific character between the date of executing it and his death. The proportions as between various beneficiaries may greatly change beyond what he had intended; he may part with this piece of property and acquire that;² one object of his bounty may die and another may come into existence; he may even die so involved in debt or utterly bankrupt as in effect to annihilate the gifts which his own testament professes to bestow.³ All this, however, does not, at our day, revoke in any such sense as to set the instrument itself practically aside in whole or in part or disentitle it to probate. The testator's appointment of executor still takes effect; his scheme of disposition is not superseded in form; only it becomes a matter of practical

thus leaves nothing for the will to operate upon at his death." *Coulson v. Holmes*, 5 Sawyer, C. C. 282, per Deady, J.; *Walton v. Walton*, 7 Johns. Ch. 268; *Henington v. Budd*, 5 Denio, 322; *Bosley v. Bosley*, 14 How. 395; *Ballard v. Carter*, 5 Pick. 116; *Kean's Will*, 5 Dana, 25; 4 Kent Com. 528; 2 Greenl. Ev. § 686; 1 Jarm. Wills, 147-149, and English cases cited. Cf. *Pratter v. Whittle*, 16 S. C. 40.

¹ A deed or conveyance of all the property given by the will is a revocation of the will and may be so pleaded. *Epps v. Dean*, 28 Ga. 533; *Bowen v. Johnson*, 6 Ind. 110. If the gift by the will is general and not specific, it necessarily fails if there be no such general property. This, however, would not be readily ascertainable until the estate was settled; and as preliminary to a settlement, the will *seems*, if there be one, ought to be admitted to probate. See *Morey v. Sohler*, 63 N. H.

507. A particular bequest may be practically revoked by a contract inconsistent with it. *Walker v. Steers*, 14 N. Y. Supr. 398.

A simulated transfer of the property bequeathed should not carry a revocation of the legacy; for the intent of the testator is thus shown to have been not to revoke. *Blakemore's Succession* (La.) 1891.

² See *supra*, §§ 28, 29.

³ No matter how long a man may live after making his testament, even though he should become insane; or how much his wealth and substance may increase or diminish; or what objects of his bounty and affection may die before him; no legal inference arises, nor even a presumption of fact, that he has revoked his will. 1 Wms. Exrs. 187, 188; Swinb. pt. 7, § 15, pl. 2; *Doe v. Edlin*, 4 Ad. & El. 582; *Warner v. Beach*, 4 Gray, 162.

administration, assisted by legal construction of the will, to determine how far and in what proportions his gifts may have failed, if they fail at all, under his unrevoked testament. For those principles of construction, search should be made under a different heading from the present.

In short, revocation of a particular will by mere inference of law or presumption is limited to a very few instances in our modern practice; while, on the other hand, changes in the condition of the testator's affairs or through the mortal chances to which both he and his beneficiaries are exposed, may work out a very different settlement and distribution of his estate after his death from what the will purported to arrange. Modern legislation itself repudiates in England and some of our States the whole theory of a presumed intention to revoke on the ground of an alteration in circumstances;¹ and what is left of that theory, aside from such statutes, it would be very difficult to say.²

§ 427 a. Mental Incapacity, Fraud, Force and Error, in issues of Revocation.—It is readily to be inferred from what has been said, that revocation of a will like any testamentary disposition, is open to impeachment, in the usual manner, for mental incapacity, or because the exertion of undue influence, fraud or force upon the testator induced the act.³ Even error on the testator's part may be shown to have caused the revocation, where he expressly founds his revoca-

¹ Act I Vict. c. 26, § 19; Appendix, *post*; 4 Kent Com. 532, 533; Stimson Am. Stat. Law, § 2676. A will in the nature of an appointment of a fund is not revoked by the testator's subsequent assent to the diversion of that fund. *Clements v. Horn*, 44 N. J. Eq. 595. And see *Burnham v. Comfort*, 108 N. Y. 535.

² See *Shaw, C. J.*, in *Warner v. Beach*, 4 Gray, 163. A will is not revoked by the death of the legatees or devisees named in it; nor by the alienation of the larger portion of the testator's estate which was specifically disposed of by his will; nor by the acquisition of a much

greater estate than he possessed when the will was made; nor by the concurrence of all these circumstances. *Hoitt v. Hoitt*, 63 N. H. 475. The law applicable to the testamentary disposition of property—with its inferences as to an intent to pass after-acquired property (*supra*, § 29) has been so far modified in these later times as to leave instances of a total revocation under this section by implication of law almost impossible. *Morey v. Sohler*, 63 N. H. 507, 512.

³ Cf. §§ 384, 387, 395, and cases cited with Part II. *supra*; *Ross v. Gleason*, 115 N. Y. 664; *Graham v. Burch*, 44 Minn. 33; 49 N. W. 697.

tion on the assumption of a fact, derived from the information he has received from others, which is shown to be false ; though where the fact was peculiarly within his own knowledge, error would be unlikely.²

² *Mendinhall's Appeal*, 124 Penn. St. 387; *Campbell v. French*, 3 Ves. Jr. 321; *Evans v. Evans*, 10 Ad. & E. 228.

CHAPTER II.

ALTERATION OF WILLS.

§ 428. **The Word "Alteration"; Alteration of Disposition or of an Instrument; Partial Revocation.**— "Alteration of a will" may be understood in either of two senses: first, and more generally, that of changing one's own testamentary disposition, by whatever external acts this may be effected; second, and more specifically, that of changing the face of the original testament by an outward act which may or may not have been performed by the testator or under his sanction.

It may be convenient to treat of this subject in both senses of the phrase. But however we may use the word "alteration," we are not to consider it as involving the idea of a total revocation of the existing will, but only a revocation *pro tanto*, if a legal revocation at all. A later will is not substituted in place of the earlier one, but there is at most a variation in the former terms, and intent must be gathered from the original will and its amendments taken together.

§ 429. **Alteration of the Instrument to be first considered; Testator's Right to alter.**— Let us first consider the more specific alteration, which consists in changing externally the face of the original testament. Acts of cancelling and obliterating, as well as of spoliation, and their effect in totally revoking a will where the intent accompanies the act, have already been discussed;¹ and it has been observed that one could partially erase, cancel or even obliterate, a written testament, under the older law, so as only to revoke the will in part, as, for instance, by annulling some particular bequest.²

Now to pursue this latter idea somewhat farther. The

¹ *Supra*, §§ 383-396.

² *Supra*, § 397.

material alteration of a deed or contract, by one party under it without consent of the other, avoids the instrument in an extreme case; otherwise it leaves the estate or interest acquired as before; and the altering party is not free to modify it by his altered intention.¹ But a will, having no element of mutuality, but resting in the testator's discretion, the maker may change it at pleasure, provided the formalities of execution which the statute imposes for the better safeguard of such instruments be properly observed. And what we say here of alteration, applies not only to changes of language and expression, but to the striking out of existing words, clauses and sentences, or the interlining and inserting others.

§ 430. **General Right of Testator to alter.**—Independently of enactments later than the Statute of Frauds, in derogation of his informal exercise of discretion, a testator may revoke his will *pro tanto*, by cancelling or obliterating a particular part of it, as well as by erasure or other spoliation; the question being one of intention on his part to be gathered from the appearance of the instrument at the probate. Thus, if he tears away, cuts off or cuts through one or more of the devises or bequests, leaving the rest of the instrument, including signatures and attestation intact, this is understood to import a partial revocation, the annulment of these particular devises or bequests, and nothing more.² So, if the testator draws his pen through some particular devise or bequest, by an act not deliberative but final,³ that devise or bequest is revoked, though the rest of the will should stand unaltered; nor is it essential even, that every word in that clause be cancelled or obliterated, for it is enough to strike out an essential part, such as the name of the devisee or legatee;⁴

¹ 11 Co. 27; 1 Greenl. Ev. § 566.

² Woodward, Goods of, L. R. 2 P. & D. 206; Scruby v. Fordham, 1 Add. 74; Christmas v. Whinyates, 3 S. & T. 81; Clarke v. Scripps, 2 Rob. 563; Borden v. Borden, 2 R. I. 94; Kirkpatrick Re, 22 N. J. Eq. 463; Brown Ex parte, 1 B. Mon. 56; Stover v.

Kendall, 1 Coldw. 557; Tudor v. Tudor, 17 B. Mon. 383; Bigelow v. Gillett, 123 Mass. 102.

³ Supra, § 393.

⁴ Ravenscroft v. Hunter, 2 Hagg. 68; Mence v. Mence, 18 Ves. 350; Sutton v. Sutton, 4 Cowp. 812; 1 Jarm. Wills, 134; 1 Wms. Exrs. 143.

yet to strike out but once where the name occurs several times, would be insufficient.¹

§ 431. **Intention should accompany ; Alterations which do not revoke.** — But, as in total revocation, intention should accompany the act and be fairly inferable from the manner of the alteration, in order to revoke in part. Where the testator alters certain legacies by erasing and interlining, and then acknowledges the same in the presence of witnesses without signing again, this is not to be pronounced a revocation, total or partial, for it was not thus intended ; but if the statute mode of execution be satisfied, the will conforms to the amended scheme of disposition.² The addition of something which is imperfect, by reason of informal execution and the like, should not at all events, have the effect of revoking that which was perfect, so as to distort the testator's real meaning.³ In all such cases the testator's obvious purpose is regarded ; and if cancelling or mutilating was part of a transaction intended by him to operate an express change of disposition, or not for the purpose of simply striking out some part of the original will, the failure of this transaction to take full effect leaves the will as originally executed, so far at least as it remains legible.⁴ But the failure of the new disposition by incapacity of the devisee or from other reasons *dehors* the will would not obstruct one's act of revocation.⁵

If, again, alterations and obliterations appear to have been only cursory and deliberative, and not intended as final, the

¹ *Martins v. Gardiner*, 8 Sim. 73. The effect of thus cancelling a clause is, that the instrument, omitting the cancelled clause, is entitled to probate. *Myrick Prob.* 128.

² *Wright v. Wright*, 5 Ind. 389; *Dixon's Appeal*, 55 Penn. St. 424. A careful interlineation is not an "obliteration" within the Will Act. *Dixon's Appeal*, ib.

³ *Heise v. Heise*, 31 Penn. St. 246; 15 Penn. St. 281. Obliterations and interlineations are inoperative to change a will, if made with a view of disposing differently, which is not carried out. Whether the change of purpose fails

because of sudden death, the want of proper attestation, or any other cause, so that the attempted disposition is invalid, the cancelling of the first being dependent thereon, is null, and leaves the will standing as before. *Stover v. Kendall*, 1 Coldw. 557; *Youse v. Forman*, 5 Bush, 337.

⁴ *Short v. Smith*, 4 East, 419; *Wolf v. Bollinger*, 62 Ill. 368; *Jackson v. Holloway*, 7 Johns. 394; *Stover v. Kendall*, *supra*; *Linnard's Appeal*, 93 Penn. St. 313.

⁵ *Hairston v. Hairston*, 30 Miss. 276; *supra*, § 410.

passages altered or obliterated remain in legal effect as before.¹

In short, alterations are considered as a whole; and where something is stricken out simply that something else may be substituted, the failure of the substitution through informality involves the failure of what was stricken out.²

§ 432. **Modern Legislation treats Informal Alterations with Disfavor.** — All such informal alterations, however, are obnoxious to the policy of our later legislation, which prescribes for wills of personalty not less than realty a formal subscription and attestation. Under many American codes, it may now be assumed that alterations of disposition, whether expressed on the face of the original instrument or by new writings, and especially if the change is not simply a complete erasure or destruction, require a statute execution in presence of witnesses in order to operate.³ The English act 1 Vict. c. 26 is explicit in this respect; at the same time permitting the testator and witnesses to sign in the margin of the original will or opposite or near the alteration, or opposite or at the end of some memorandum on the will which refers to the alteration.⁴

¹ *Parker v. Bainbridge*, 3 Phillim. 321; 1 Add. 409; 1 Wms. Exrs. 143.

² A testator made certain erasures and interlineations in his duly executed will. After he made the alterations, two persons, at his request, signed the will, as witnesses to "the erasures and interlineations made" by the testator. What these interlineations, etc., were, the witnesses did not know. It was held (1) that the alterations did not supersede the provisions of the will; (2) that the witnessing of such alterations did not amount to an attestation of the will as altered; and (3) that the alterations did not operate to revoke the original will. *Penniman's Will*, 20 Minn. 245. In this case the court discussed the doctrine of ineffectual revocation, and rested upon the principle that when part of a will is cancelled (or words, or

clauses) for the purpose of substituting another disposition, other words, etc., which disposition fails through informality, no partial or total revocation takes place, but the will stands as originally framed. For here the cancellation or obliteration was with the idea of substituting; and what is relative or subsidiary cannot take effect by itself.

³ See *Dixon's Appeal*, 55 Penn. St. 424; *Quinn v. Quinn*, 1 N. Y. Supr. 437; *Eschbach v. Collins*, 61 Md. 478. The New York code now requires similar formalities in altering or revoking a will to those necessary for its execution. *Prescott R.*, 4 Redf. 178.

⁴ "No obliteration, interlineation, or other alteration made in any will, after the execution thereof, shall be valid or have any effect, except so far as the words or effect of the will before such

The statute attestation of an original will is not the attestation of the will as altered. And if there is no sufficient attestation of the will as altered, the alteration (as by interlining or striking out and substituting) cannot take effect, but the will stands as before.¹

§ 433. **The Same Subject: Effect of Alteration, etc., so as to render Illegible.**—The effect of such legislation, where the alteration by obliteration or cancelling has rendered the original words of the will illegible, requires further consideration. Here it may be asked whether the local statute permits of partial as well as total revocation, and whether or not the act in question amounts to a partial destruction of the will within its intendment.²

Partial revocation of a will by burning, tearing, or otherwise destroying, appears still allowable under the English statute, as before;³ and thus far an unattested alteration may still operate. But obliteration, or cancellation which does not wholly efface that part of the will and render the expunged words illegible, is no longer effectual without some signing and attestation. And that alteration which consists in substituting or interlining words or clauses requires substantially the execution appropriate to wills.⁴

alteration shall not be apparent, unless such alteration shall be executed in like manner as hereinbefore is required for the execution of the will; but the will, with such alteration as part thereof, shall be deemed to be duly executed if the signature of the testator and the subscription of the witnesses be made in the margin, or on some other part of the will opposite or near to such alteration, or at the foot or end of or opposite to a memorandum referring to such alteration, and written at the end or some other part of the will." Act 1 Vict. c. 26, § 21; Appendix, *post*. Interlineations are consequently valid under this act, and entitle the amended will to probate, when opposite them are the initials of the testator and of the attest-

ing witnesses. 24 E. L. & Eq. 608; *Blewitt Re*, 5 P. D. 116.

¹ *Jackson v. Holloway*, 7 Johns. 399; *Doane v. Hadlock*, 42 Me. 72; *Penniman's Will*, 20 Minn. 245.

² *Supra*, § 397, last c.

³ *Supra*, § 397; 1 Wms. Exrs. 128, 141, 143.

⁴ See 1 Vict. c. 26, § 21, cited *supra*; also *ib.* § 20, which requires revoking by "destroying." Under § 21, the alteration made in the will after execution shall not be valid unless they prevent the words originally written from being "apparent"; that is to say, apparent by looking at the will. If the obliteration was made simply to strike out or partially revoke, the obliteration is sufficient if it amounts to an erasure,

§ 434. **Probate with or without Interlineations, etc.**— When a will is informally altered by the testator, as by interlining a new bequest without the statute attestation now required, the legal effect is not to make the will void, but to establish it in probate as it stood before the change was made.¹ But where interlineations and alterations are made in the original will so as to conform with the existing statute, or are otherwise legally made, the will with its interlineations and amendments should be admitted to probate.² If a will is altered after execution and then republished and confirmed by a codicil, it is enough to show that the alterations were made before the execution of the codicil.³

On the other hand, alterations made in a will by a stranger, after its due execution, and without the testator's knowledge or sanction, do not affect the validity of the testament in other respects.⁴

§ 435. **Presumption as to Time of Alterations, etc.; Proof.**— The question is sometimes asked, at what time alterations in a will shall be dated, where positive evidence is altogether wanting. Not without some controversy in the courts, it appears at length to have been settled, that unattested and unexplained alterations upon the face of a will shall be pre-

and the change will take effect accordingly. But where the obliteration was made for the purpose of altering the gift, and not revoking it, and the new gift cannot take effect because the substituted words have not been properly attested as the new statute requires, evidence may be adduced *aliunde* to show what the original words were. *Soar v. Dolman*, 3 Curt. 121; 2 Curt. 337; *Brooke v. Kent*, 3 Moore P. C. 334; 1 Jarm. 142; 1 Wms. Exrs. 144, 145. If it cannot be shown what those words were, probate will be decreed in blank. 1 S. & T. 238.

¹ While our later legislation quite discourages partial revocation and informal changes in an executed will, alterations, erasures, and obliterations found in a will are treated according to circum-

stances. If they preceded the formal execution, they stand as the final expression of the testator's wishes; but if made afterwards, the alteration fails unless the will in its altered shape is duly attested, and probate is granted as of a valid will, according to its import as originally attested. *Schoul. Exrs.* § 84; *Wheeler v. Bent*, 7 Pick. 61; *Jackson v. Holloway*, 7 John. 394; *Prescott Re*, 4 Redf. 178; *Gardiner v. Gardiner*, (N. H.) 1890.

² *Blewitt Re*, 5 P. D. 116; *supra*, § 248; *Penniman's Will*, 20 Minn. 245.

³ *Burge v. Hamilton*, 72 Ga. 568; *Tyler v. Merchant Taylors' Co.*, 15 P. D. 216.

⁴ *Grubbs v. McDonald*, 91 Penn. St. 236; 1 Gall. 70; *Morrell v. Morrell*, 7 P. D. 68.

sumed to have been made after, and not before the execution of the instrument; and such is the rule as now announced both in England and leading American States.¹ This presumption yields, however, to actual proof; and slight circumstances, including the sense or a testator's own declarations of intent before executing his will, may establish the contrary.² It is unquestionably proper that interlineations or alterations of any kind made before execution should be noted in the attestation of witnesses, and thus obviate all controversy.

Where the will was originally prepared with blanks which the testator afterwards filled up, it is presumed that they were filled as they should have been, before the attestation.³ And as all formalities are supposed to have been rightly observed, if observed at all, the mere circumstance that such blanks are filled with a different ink or in a different handwriting from the body of the will does not afford a presumption of unattested and inoperative alteration.⁴

§ 436. **Alteration in a General Sense expressed by Codicil.** — Now to speak of altering one's disposition in the general sense, without confining ourselves to the physical change or mutilation of the original instrument. The natural expression of such alteration, and, in view of late legislation, by far the safer one, is by means of a codicil or codicils, duly executed like any other will; so that the original undefaced will, to-

¹ *Cooper v. Bockett*, 4 Moore P. C. 419; *Greville v. Tylee*, 7 Moore P. C. 320; *Shallcross v. Palmer*, 16 Q. B. 747; 16 Q. B. 745; 1 Wms. Exrs. 130; *Wetmore v. Carryl*, 5 Redf. (N. Y.) 544; *Dyer v. Erving*, 2 Demarest, 160.

But see *Williams v. Ashton*, 1 Johns. & H. 115, 118, where Wood, V. C., criticises the rule as thus stated, and intimates that the more correct view would be, that the *onus* is cast on the party who seeks to derive an advantage from the alteration in the will, to adduce some evidence from which a jury may infer that the alteration was made before the will was executed.

² Where the date of a will appeared

to have been changed from 1875 to 1873, but the testator died prior to 1875, the change is presumed to have been made when the will was executed. *Martin v. King*, 72 Ala. 354. Interlineation of a name which manifestly expresses the testator's original intention is presumed to have been made before execution. 6 Dem. 162.

As to the testator's declarations, and how far they are admissible on this point, see *Doe v. Palmer*, 16 Q. B. 747; *Williams v. Ashton*, 1 Johns. & H. 115.

³ *Birch v. Birch*, 1 Rob. 675.

⁴ *Greville v. Tylee*, 7 Moore P. C. 320; 2 Rob. 192; *Hindmarch*, Goods of, L. R. 1 P. & D. 307.

gether with such addition or additions, shall stand in force as one's full last testament, after his death, like a statute with its later amendments.¹ We have already defined the codicil, whose proper office, as elsewhere intimated, is to add to or amend a will by way of postscript, and not to repeal it utterly.² Such an instrument being to all intents a "will," it is to be executed and held subject to repeal like any other testament.

§ 437. **Codicil does not revoke Will except so far as Necessary.**—Many testamentary causes arise where the effect of one or more codicils upon a prior will has to be considered;³ and it is a fundamental maxim that no codicil shall revoke a prior will more than is absolutely necessary at all events to give its own provisions effect; unless it contains an express clause of full revocation.⁴ The decisions which turn upon this principle are very numerous and need not be stated at length;⁵ being quite prolix for the most part and involving the construction of language as variable as the details of mental intention itself.

Even though the codicil should profess to make a different disposition of the whole estate, the principle above stated is the natural and controlling one.⁶ And words and expressions contained in the codicil may by construction restrict its operation. Thus, it is held that a declared purpose therein to alter the will in one or more stated respects, implies that it is not altered in other respects.⁷ And that a specific gift in

¹ *Supra*, §§ 7, 8.

² *Ib.*; *Fuller v. Hooper*, 2 Ves. Sen. 242; *Evans v. Evans*, 17 Sim. 108. In ancient times "codicils" might be made, as it appears, by those who died without testaments; but this was not usual; and in our modern acceptation, the codicil is part of a will, for its explanation or alteration, or to add or subtract from the former disposition. 1 Wms. Exrs. 8; Swinb. pt. 1, § 5, pl. 5, 9.

³ *Supra*, § 409.

⁴ The testator himself commonly produces the uncertainty, by framing the codicil without a clear idea of what his

previous will contained. See 1 Jarm. 176.

⁵ 1 Jarm. Wills, 176, and cases cited; *Duffield v. Duffield*, 3 Bligh. N. S. 261; *Beckett v. Harden*, 4 M. & Sel. 1; *Evans v. Evans*, 17 Sim. 86; *Tilden v. Tilden*, 13 Gray, 103, 108; *Wetmore v. Parker*, 52 N. Y. 450; *Lemage v. Goodban*, L. R. 1 P. & D. 57; *Brant v. Wilson*, 8 Cow. 56; *Johns Hopkins University v. Pinckney*, 55 Md. 365; *Bradley v. Gibbs*, 2 Jones Eq. 13.

⁶ *Harwood v. Goodright*, Cowp. 87; 14 Beav. 583.

⁷ *Quincy v. Rogers*, 9 Cush. 291.

a will is not revoked by a general gift in the codicil.¹ And that a general expression in the codicil must be confined to its meaning in the will.² And that a clear gift in the will is not revoked by vague or doubtful expressions in the codicil.³ But all artificial rules like these should bend to the real intention of the testator, as gathered from the whole face of the paper, aided in doubtful cases by proof *aliunde*.

Other rules of construction, equally pliable, may be cited in this connection. Thus a gift by codicil "instead of," or "in lieu of," what the will contains, means substitution, which may or may not be total, according to circumstances.⁴ The revocation by codicil of one's appointment in a certain capacity, as trustee, for instance, where the will made him both trustee and executor, does not carry both offices, nor affect a legacy bestowed upon him from other considerations.⁵ But where a life interest is given, and a special power of appointment over the property besides, the subsequent revocation of all gifts "in favor of" the donor, revokes the power as well as the life interest.⁶ The disposition of the courts to generalize while construing the expression of particular wills must not, however, be taken with too implicit a confidence.

§ 438. **Later Provisions, whether by Way of Substitution or Addition.** — Whether provisions under a later will or codicil are intended for substitution, or as something additional and cumulative to the gift by the earlier one, must be determined by comparing the instruments to discover their true intent.⁷ But in case of doubt an additional gift is presumed rather than revocation;⁸ unless, indeed, resort may be had to parol evidence outside the instruments for assisting the conclusion.⁹

¹ *Arrowsmith's Trust*, 2 D. F. & J. 168; 1 Jarm. 177, 178; *Brownell v. De Wolf*, 3 Mason, 456.

² *Clarke v. Butler*, 1 Mer. 304.

³ 1 Jarm. Wills, 178; 14 Sim. 89;

⁴ *Randfield v. Randfield*, 8 H. L. Cas. 225; *Joiner v. Joiner*, 2 Jones Eq. 68; *Burgess v. Burgess*, 1 Coll. 367; 5 Jur. N. S. 687.

⁵ *Brough Re*, 38 Ch. D. 456.

⁶ 55 Md. 365; 3 Sim. 24; 1 Jarm. 181; ⁷ 1 Wms. Exrs. 167, 185.

Kiver v. Oldfield, 4 De G. & J. 30;

⁸ *Bartholomew v. Henley*, 3 Phillim.

Payne Re, W. N. (1887) 52.

⁹ *March v. Marchant*, 6 M. & Gr. 813; 316.

5 Jur. N. S. 12; *Hill v. Walker*, K. & J. ⁹ *Supra*, § 423.

In general, the different parts of a will, or of a will and codicil, should be reconciled if possible and receive a fair and consistent interpretation.¹ But where there is a real discrepancy in the gifts between will and codicil, the codicil should prevail in preference.² A codicil might by its terms vary all former dispositions and yet by its silence leave the original choice of executors in force.³

§ 439. **Whether Revocation of the Codicil takes Effect upon the Will; and Vice Versa.** — The general effect of one's later and inconsistent will upon his earlier one has already been discussed;⁴ as also the inferences to be drawn where of two inconsistent wills the testator repeals the later without the earlier one.⁵ The testator's intention is usually followed, if it may be gathered from the face of the whole transaction and legislation does not impede. Thus, where a father, angry with his son, cut him off with a shilling by both will and codicil, and then after becoming reconciled to him, cancelled the primitive clause in the codicil, but not in the will (where it consisted of interlined words), the court extended the cancelling act to the will as far as possible.⁶

Where, on the other hand, the will has been destroyed by the testator, but the codicil is preserved which professed to be part of the will, the question arises whether the revocation of the will operates by inference to revoke the codicil also. The answer depends mainly upon the contents of the several papers and the intent to be fairly gathered from the face of the papers, aided, if need be, by extrinsic evidence. If the provisions of the codicil were so dependent on the will as not fairly to stand apart and independently of it, the destruction of the will carries that of the codicil likewise.⁷ But if the provisions in the codicil were independent of the

¹ Part VI., *post*; *Colt v. Colt*, 32 Conn. 422.

² See *Towry Re*, 41 Ch. D. 64; *supra*, §§ 406, 407.

³ *Newcomb v. Webster*, 113 N. Y. 191.

⁴ *Supra*, § 417.

⁵ *Supra*, § 413.

⁶ *Utterson v. Utterson*, 3 V. & B. 122.

⁷ 1 Jarm. Wills, 139; *Usticke v. Bawden*, 2 Add. 116. The English spiritual courts before 1 Vict. c. 26, appear to have favored such a construction, in the absence of proof showing a contrary intention. *Ib.*; 2 Add. 229; *Coppin v. Dillon*, 4 Hagg. 369.

will and capable of subsisting separately, the inclination is to declare the codicil unrevoked, unless from other circumstances a different intention may be gathered.¹ Evidence of actual intent may, however, clear such controversies. Thus, where a testator who had executed a codicil at the foot of his will, cut off his signature from the will only, this was lately held to revoke the codicil also, on proof that such was the testator's intention.² On the other hand, where, at the testator's death, the sole testamentary papers found were a duly executed codicil and two drafts of wills, as to the execution or revocation of which there was no evidence, the codicil was by itself admitted to probate, as still unrevoked; and this notwithstanding that the codicil was dependent on the missing will to which it belonged, and could not be construed without it.³

The usual and natural plan is of course to revoke by suitable act both will and codicil simultaneously, where such is the testator's real purpose, and thus leave nothing in the transaction to doubtful inference.

§ 440. **Misrecital of Will in Codicil; their Mutual Comparison.**—The mere misrecital of a will by a codicil is inoperative, and will not modify the dispositions of the original instrument; but an erroneous recital of a will, coupled with or followed by a clear indication that some modified or inconsistent disposition is intended by the codicil, operates to modify or alter the earlier gifts.⁴

¹ *Tagart v. Squire*, 1 Curt. 289; 1 Jarm. Wills, 139; *Greig Re*, L. R. 1 P. & D. 72.

² *Bleckley, Goods of*, 8 P. D. 169. And see *Greig Re*, L. R. 1 P. & D. 72.

³ *Gardiner v. Courthope*, 12 P. D. 14. This decision proceeded like others upon the principle of the probable intention of the deceased. "It is perfectly true that the presumption of law, when a testamentary document in the possession of the deceased is not forthcoming at his death, is that it was destroyed with the intention of revoking it. But to go

further and to hold that the will was destroyed with the intention to revoke, because it is not found among the deceased's papers, and then to say that the codicil which is preserved among the deceased's papers was therefore a document which the deceased intended to destroy also, is, I think, going beyond the bounds authorized by the law." *Butts, J., ib.* 17.

⁴ *Margitson Re*, 48 L. T. 172. A paper, bearing the same date with the will, similarly executed, and placed in the same envelope, has been pronounced a codicil, though it made no reference

It often happens that an ambiguity in a will is controlled and guided by the recitals of a codicil.¹ And in general the reference from the one instrument to the other may be useful for explaining the testator's full and final purpose.

When a testator by a codicil confirms his will, the will together with all previous codicils is taken to be confirmed. It is sometimes said that a codicil confirming a will makes the will for many purposes to have the date of the codicil; but this is no technical rule to override the true intent of the transaction, and its force is limited accordingly.²

in language to the will. *Perkins v. Perkins*, 84 Va. 358 (one of the three judges dissenting). *Cf.* *Gibson v. Gibson*, 28 Gratt. 44.

¹ *Darley v. Martin*, 13 C. B. 683; 1 Jarm. 532. See Part VI., *post*.

² *Hopwood v. Hopwood*, 7 H. L. 728; *Biddulph v. Hole*, 15 Q. B. 848; 30 Neb. 149.

CHAPTER III.

REPUBLICATION OF WILLS.

§ 441. **Republication defined; Acts Express and Implied.**— By the republication of a will is signified that act done by a testator from which the law concludes that an instrument once revoked was intended by him to revive and operate as his last will. The act being sufficient in a legal sense, his new intention is permitted to operate accordingly.¹

A revoked will may be republished in one of two ways: (1) by its actual re-execution in effect, which constitutes an express republication of the will; (2) by less formal acts from which republication may be implied, or as it is sometimes called, by constructive republication.² These methods we proceed to examine in turn.

§ 442. **Express Republication; Statutes requiring Re-execution or a Codicil, etc.**— In England, at the present day, and doubtless to a considerable extent by the force of local legislation in the United States, express republication of a will is the only kind recognized. There must be an actual re-execution of the original will; or, what is tantamount to this, the due execution of some codicil which shows an intention to revive the instrument.

This statute rule for a long time affected only devises of real estate; wills of personalty being capable of implied and informal republication, as they were of informal execution in the first place. The Statute of Frauds, which made a formal execution essential for all wills of land,³ declared, as a part of the same scheme of policy, that no will of lands should be

¹ See Bouv. Dict. "Republication." To "revive" a will is used as synonymous with "republish." 1 Wms. Exrs. 205; Act 1 Vict. c. 26, § 22.

² 1 Jarm. Wills, 193; Bouv. Dict. "Republication"; 1 Wms. Exrs. 205.

³ *Supra*, §§ 252, 253.

republished, except by its re-execution in the presence of three witnesses, or by a codicil duly executed in like manner. For upwards of a century and a half longer,¹ wills of personal property continued capable of informal revival, when the new Wills Act of Victoria so extended the formalities of execution as to embrace wills of whatever property, and at the same time cut the specious doctrine of informal republication at the root. After January 1, 1838, no will or codicil, or any part thereof, which had been in any manner revoked, was to be revived otherwise than by its re-execution, or by a codicil executed with the full statute formalities, and showing an intention to revive the same.²

In the United States it has also been held, by construction of local enactments more or less positively worded, that the republication of a will is essentially at the present day the making of a new will, and the usual formalities of execution must be followed.³

§ 443. **The Same Subject.**—Legislation of this tenor excludes all other means of showing one's intention to revive his will. Destruction of the revoking instrument, as by burning, tearing or cutting, is not sufficient; nor do the rules of proof in revocation afford a criterion for proving republication.⁴ As for the execution of a codicil which (agreeably to the terms of the English statute) shows "an intention to revive," that intention must appear on the face of the codicil with reasonable certainty, and is not to be gathered from extraneous proof.⁵ No particular words, however, are neces-

¹ From 1677 to 1837, to be more precise.

² Act 1 Vict. c. 26, § 22; Appendix, *post*. This section proceeds to state that "when any will or codicil which shall be partly revoked, and afterwards wholly revoked, shall be revived, such revival shall not extend to so much thereof as shall have been revoked before the revocation of the whole thereof, unless an intention to the contrary shall be shown."

³ *Barker v. Bell*, 46 Ala. 216; *Penniman's Will*, 20 Minn. 245. In Pennsylvania since legislation in 1833 a new rule has applied. *Gable v. Daub*, 40 Penn. St. 217, 230.

⁴ *Major v. Williams*, 3 Curt. 432. As to the former rule of constructively reviving an earlier existing will by destroying the later one (which this legislation changes), see *supra*, §§ 413-415.

⁵ Lord Penzance laid down the rule at some length in *Steele, Goods of*, L.

sary to be used in a codicil in order to effect a republication of the will to which it is annexed;¹ and the execution of the codicil dispenses with re-execution of the will itself.²

With regard to the proper method of re-executing, little remains to be said. The testator need not sign the will again; for if he acknowledges his signature before the required number of witnesses with the proper formalities this is good for either re-execution or an original execution.³ Publication and republication call for essentially the same proof.⁴ Generally speaking, it is a good republication for a testator to call witnesses of the statute number to such republication, declaring the paper to contain his last will, and then causing the witnesses to subscribe their names by way of attesting the transaction.⁵

§ 444. **Implied Republication.**—Next, as to implied republication, for which, it is plain, little footing is found under our modern enactments. Possibly there are American codes which still leave the law of republication as it stood in England prior to 1838; and in English or American jurisdictions, moreover, wills of personal property made before the change of policy took effect, may still be offered for probate. At all

R. 1 P. & D. 575; holding that the reference in a codicil by date to a revoked will was insufficient to revive it, without evidence on the face of the codicil that the testator so intended. But *semble*, express words of such intention may be dispensed with, if the disposition made by the codicil is inconsistent with any other intention. *Ib.* See § 447.

Reference to "my said will," etc., may well identify the will to be revived by codicil, unless it appears that there was more than one will of the testator in existence. 2 Notes Cas. 406; *Terrible Re*, 1 Sw. & Tr. 140. See further, 1 Robert. 583; 2 Robert. 318; *Marsh v. Marsh*, 1 Sw. & Tr. 528. In *McLeod v. McNab*, App. Cas. (1891), 471, a codicil revived by reference a former will; and it was held that the will was no longer affected by the partial revocation made by an intermediate codicil.

¹ *Corr v. Porter*, 33 Gratt. 278.

² *Brown v. Clark*, 77 N. Y. 369. To "confirm" in such a codicil means to "revive." App. Cas. (1891) 471.

³ See *supra*, §§ 321-325.

⁴ *Musser v. Curry*, 3 Wash. 481; *Simpson Re*, 56 How. Pr. (N. Y.) 125; *Carey v. Baughn*, 36 Iowa, 540.

⁵ 1 Wms. Exrs. 206, Am. Ed. See also *Dunn v. Dunn*, L. R. 1 P. & D. 277; *Brown v. Clark*, 77 N. Y. 369. The present statute of New York on this subject is peculiar; and it is held in a lower court of that State that an oral declaration by the testator in presence of two witnesses being sufficient for a valid "publication" (which publication is not common in other States, *supra*, § 326) is also sufficient for the republication of a revoked will. *Simpson Re*, 56 How. Pr. 125.

As to republishing a conditional will which has failed, by re-execution, etc., see *supra*, §§ 287, 288.

events, the once honored theory of reviving a testament by informal acts is worthy of a professional student's curiosity.

From 1677 to 1837 in England, and down to a period varying not greatly from the latter date in most parts of the United States, implied republication might operate upon wills of personalty, though excluded as to devises of land by the Statute of Frauds, in pursuance of which attestation became an essential part of the original execution. A will of the former description required no other formality than writing; and once revoked it needed no re-execution or solemn codicil to revive it; but republication might be effected by an unattested codicil or other writing, and even by the mere parol acts or declarations of a testator whose intention could be thus informally established.¹ Such appears to have been the doctrine of our law from the earliest times, so far as wills of chattels or personal property were concerned; and even a devise of land, made under the old Statute of Wills, prior to the act of 29 Charles II., permitted of a parol revival in like manner.² After the Statute of Frauds went into effect, the republication of a will of real estate could not be proved by parol; but as to wills of personalty the law continued as before.³

§ 445. **The Same Subject: Oral Instances cited.** — A will long laid aside and so defaced by vermin or the natural elements that a court might otherwise have supposed it revoked once and for all, can accordingly receive new force by later acts and words of the testator showing an intent that it shall operate; though this may have been by virtue of republishing or as having never in fact been revoked.⁴ A cancelled or obliterated will which remained legible might also be revived by words and signs of the testator showing that he meant it to operate notwithstanding.⁵

¹ 1 Wms. Exrs. 206, 207. The objection, sometimes suggested, that the prohibition of nuncupative wills in 29 Car. II. § 19, might involve a prohibition of nuncupative republications, has no force. 2 Cas. temp. Lee, 494; 1 Wms. Exrs. 66, 68, 206.

² Jackson v. Hurlock, Amb. 494; Cro. Eliz. 493; Alford v. Earle, 2 Vern. 209; 1 Wms. Exrs. 207.

³ See Cogdell v. Cogdell, 3 Desau. 346; Havard v. Davis, 2 Binn. 425.

⁴ Braham v. Burchell, 3 Add. 264.

⁵ Slade v. Friend, cited in 2 Cas. temp.

But the intention to revive or republish one's will of personality, or treat it as in full existing force, must have consistently appeared on all the proof; and where the face of the transaction imported an opposite conclusion, direct and unequivocal evidence of intent was required; mere declarations of the testator being treated as insufficient. As, for instance, where two inconsistent wills were left, or a later will with a clause expressly revoking the earlier one, both being preserved together.¹ For the attempt to dispute the plain effect of writings by oral or less solemn testimony is to be discouraged. So that, after all, the chief decisions favorable to oral republication seem to have been rendered where the facts left it in doubt whether the will had ever been revoked, and theories of non-revocation or revival led to the same legal result, namely, the establishment of the will propounded for probate. Under all circumstances, the facts should have consisted with the intent of republishing or at least of declaring the will to be in present force.² And in the United States, several decisions announce the rule that a will once revoked by a written declaration cannot be republished by parol.³

Where there is no real revocation of a will, but rather a suspended intention in the testator's mind as between various wills he has duly executed, the practical effect of his final choice among them is favorably regarded in the probate.⁴

Lee, 84; Brotherton v. Hellier, 2 Cas. temp. Lee, 55; 1 Wms. Exrs. 211. But *qu.* whether a will completely destroyed by way of revocation could be republished by oral words and acts.

¹ Daniel v. Nockolds, 3 Hagg. 777; Stride v. Cooper, 1 Phillim. 336, *per* Sir John Nicholl; Witter v. Mott, 2 Conn. 67; Jackson v. Potter, 9 Johns. 312.

² A testator was searching for another paper, and one who assisted him took up the will by mistake, whereupon the testator casually observed, "That is my will"; this was held by Lord Hardwick insufficient to show *animus republishandi*. Abney v. Miller, 2 Atk. 599.

³ Witter v. Mott, 2 Conn. 67; Jackson v. Potter, 9 Johns. 312; Carey v.

Baughn, 36 Iowa, 540; Love v. Johnston, 12 Ired. 355.

On the other hand, circumstances of intent are favored in some of our cases, as constituting an oral revival sufficient for all practical purposes. Thus, where a testator executed a second will, supposing at the time that his first will was lost, and he subsequently found the first, and destroyed the second, declaring that he preferred the first, the latter may properly be admitted to probate. Marsh v. Marsh, 3 Jones L. 77. We here suppose that no local statute is transgressed by the decision. *Semble*, that under circumstances like these the first will was never fully revoked.

⁴ In Williams v. Williams, 142 Mass.

§ 446. **The Same Subject: Oral Revival after Revocation by Act of Law.** — The effect of oral revival where the will has been revoked by act of law may here be noticed.¹ The will of a woman ceases to operate on her subsequent marriage; and although she should survive her husband the will remains inoperative without a republication.² The question then arises whether informal republication upon her widowhood gives new operation to the will, aside from legislative restriction. It is decided in the English ecclesiastical courts that it does: that her recognition of the revoked will after her husband's death may be by words and conduct.³ But this doctrine receives no extended favor. The will of a woman which became legally revoked by her subsequent marriage acquires no validity at her predecease, though her surviving husband assent to its probate.⁴ Nor is a will, revoked by inference of law on the subsequent birth of a child, or on subsequent marriage, to be considered as republished on merely parol proof, where the local statute requires all wills to be formally subscribed and attested, or where publication is an act subjected by local law to written solemnities.⁵ An express revival of the will which has been legally revoked by subsequent marriage, or by marriage and the birth of a child, or by birth of a child alone (as legislation may require) is the desirable mode in these later times; and executing a codicil to that purport accomplishes usually the result as thoroughly as would the re-execution of the revoked will itself, provided the statute formalities be pursued.⁶

515, the final choice of the testator as between three wills he had fully executed was made clear to the court. He had destroyed the first and third and preserved the second at his death. This was held to sufficiently revive the second will for probate, without further evidence of republication. Here, *semble*, the second will had not been fully revoked by the execution of the third.

¹ *Supra*, § 424.

² 1 Cas. temp. Lee, 513; Long v. Aldred, 3 Add. 48; Wollaston *Re*, 12 W. R. 18; *supra*, § 424.

³ Miller v. Brown, 2 Hagg. 209; *supra*, § 424.

⁴ Carey, *Re*, 49 Vt. 236; *supra*, § 424.

⁵ Carey v. Baughn, 36 Iowa, 540; Fransen's Will, 26 Penn. St. 202. *Semble* if publication may be proved by parol, so may republication; and *vice versa*. Ib.; 56 How. N. Y. Pr. 125.

⁶ Brown v. Clark, 77 N. Y. 369; 2 Notes Cas. 406. Where a testator whose will became revoked by his subsequent marriage made a codicil, on the day of his marriage and after the ceremony, which revived and confirmed the

Generally speaking, where a will is revoked by legal inference from a change in the testator's condition, a later testamentary writing, duly executed, revives it, if of corresponding tenor.¹

§ 447. **Implied Republication by Codicil or Writing.**—An implied or constructive republication takes place, by a codicil suitably expressed; and so far as unattested writings served formerly as wills on the strength of one's testamentary intent, unattested codicils or mere writings might revive as well as alter a will. Nor by the old law was it necessary to annex the codicil to the former will which it republished,² nor to expressly republish the former will, provided the codicil appeared to intend republication in effect. A codicil which referred vaguely or even inaccurately to the prior will might yet operate to republish it;³ for it was held that every codicil is constructively a part of a testator's will, and as such proves that the testator, when he made it, considered his will as then in existence.⁴

This somewhat strained rule of constructive intent, though liable to extend the inference of republishing beyond one's particular intent, yet kept that intent in view for ultimate guidance. For while the rule appeared to justify the conclusion that the codicil was, by its own force and independently of any expressed or implied intention to that effect, a republication of the will, unless a contrary intent was indicated by the instrument with reasonable certainty,⁵ yet the

will, and the codicil could not be found after his death, probate was granted of the will and codicil on oral proof repelling the idea that the testator had ever changed his intention. *James v. Shrimpton*, 1 P. D. 431.

¹ *Brady v. Cubitt*, 1 Doug. 31.

² 1 Wms. Exrs. 211, 212, and cases cited; *Acherly v. Vernon*, 3 Pro. P. C. 107. But attaching the codicil to one of two or more wills was regarded as effectively indicating that the codicil was intended to republish that particular will. *Ib.*

³ *Rogers v. Pittis*, 1 Add. 38, citing *Jansen v. Jansen*; 1 Ves. jr. 490.

⁴ *Acherly v. Vernon*, 3 Bro. P. C. 107; *Barnes v. Crowe*, 1 Ves. jr. 486; 4 Bro. C. C. 2; *Duffield v. Elwes*, 3 B. & C. 705; *Dickinson v. Stidolph*, 11 C. B. N. S. 341; *Burton v. Newbery*, L. R. 1 Ch. D. 234; *Brown v. Clark*, 77 N. Y. 369; *Haven v. Foster*, 14 Pick. 543; *Corr v. Porter*, 33 Gratt. 278; *Stover v. Kendall*, 1 Cold. 557; *Neff's Appeal*, 48 Penn. St. 501.

⁵ See *Neff's Appeal*, 48 Penn. St. 501.

question was, whether the particular case fell within the general rule. And where it appeared by the terms of the codicil that it was not intended to operate so as to republish, the usual presumption failed, and no republication took place.¹

§ 448. **General Effect of Codicil in reviving what was imperfectly executed.**—A new will duly executed may stand as a final disposition, whether or not the same idea was initiated in former papers no longer preserved. But according to various decisions, a codicil, as such, may refer and attach to some former invalid testament still extant by suitable and clear expressions so as to confirm and republish, and give valid operation to the whole as one's will.² As where the former instrument was imperfectly executed.³ Or where it was made while the testator was coerced and the coercion is afterwards removed.⁴ Or in the case of a married woman, disabled through coverture from disposing by her will at the time she made it.⁵ That the most sensible course, for these days, is to destroy the inoperative instrument, and make a will *de novo* embodying whatever is desirable in the former invalid instrument, we need hardly argue.

§ 449. **The Same Subject: Former Efficacy of Republishing so as to dispose of After-Acquired Property.**—Formerly the

¹ Bowes v. Bowes, 2 B. & P. 500; Haven v. Foster, 14 Pick. 541; 1 Wms. Exrs. 213.

Where a codicil is made as part of one's last will, it will be presumed to refer to the will in existence and in force, and not to one already cancelled and revoked, though both exist undestroyed. Crosbie v. Macdoulal, 4 Ves. 615; Hale v. Tokelove, 2 Rob. 326. And a codicil which refers to a will of a particular date, and not to a subsequent codicil, does not operate to republish that subsequent codicil. Burton v. Newbery, L. R. 1 Ch. D. 234. Nor does a codicil republish any part of the will inconsistent with its own terms. 26 Barb. 68. A mere casual reference in a codicil to a former revoked will does not revive it. Dennis, Goods of,

P. (1891) 326. And see Smith *Re*, 45 Ch. D. 632.

² Cf. *supra*, § 281.

³ Beall v. Cunningham, 3 B. Mon. 390; Harvy v. Chouteau, 14 Mo. 587; McCurdy v. Neall, 42 N. J. Eq. 333; Murfield's Will, 74 Iowa, 479; 15 P. D. 216. But a holographic codicil which is unattested cannot bring into operation a former invalid will. 83 Ky. 584. See § 255.

⁴ O'Neill v. Farr, 1 Rich. 80.

⁵ Braham v. Burchell, 3 Add. 243.

So, too, under the former English Statute, it was held that where an infant made a will before he was competent to do so, he might expressly approve the will after arriving at competent age. *Supra*, §§ 39-44. And persons of unsound mind might republish, when fully

efficacy of a codicil in republishing a prior will was especially valued, inasmuch as it might enlarge the operation of the original testament by disposing of more property. As already observed, a devise, by the technical theory of our earlier law, carried no lands acquired after its date ;¹ while republication or a new devise alike required a testamentary writing duly attested, in order to affect one's real estate.² By virtue of a codicil properly subscribed and witnessed, lands acquired after the date of the will and before the execution of the codicil would pass under the will.³ This furnished a strong motive for giving to codicils the republishing effect ; and such a turn of construction was constantly urged by counsel, so as to give consistency to the maker's disposition as a whole, if the language used could possibly bear it. Courts yielded to the pressure ; and even codicils which expressed no intention to republish, which did not refer to the former will nor in terms confirm it, which were occupied, in fact, with property of a different character, might, by the simple force of reviving the residuary clause of the former will, pass lands acquired since the will was executed.⁴ But a testator's intent was not to be tortured to produce this result ; and republication might be negatived by the contents of the will itself,⁵ or where the words of the will were not general enough, when brought down to date, to supply the disposition which the codicil itself omitted.⁶

Since the passage of statutes, English and American, which dispense with continuous seisin and permit an original will to operate upon after-acquired lands wherever the testator so intended, this doctrine of revival by codicil has lost its

restored to reason, by an express act. *v. Astor*, 16 N. Y. 9; *Corr v. Porter*, 33 Swinb. pt. 2, § 3, pl. 2; 1 Wms. Exrs. Gratt. 278.

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¹ *Supra*, § 29.

² *Supra*, § 442.

³ 2 Eq. Cas. Ab. 769, pl. 1; *Pötter v. Potter*, 1 Ves. 437; *Piggott v. Waller*, 7 Ves. 98; *Miles v. Boyden*, 3 Pick. 213; *Brownell v. De Wolf*, 3 Mason, 486; *Dunlap v. Dunlap*, 4 Desaus. 305; *Jones v. Hartley*, 2 Whart. 103; *Cogdell v. Cogdell*, 3 Desaus. 346; *Langdon*

⁴ *Ib.*; 1 Jarm. Wills, 193.

⁵ *Strathmore v. Bowes*, 7 T. R. 482; *York v. Waller*, 12 M. & W. 591.

⁶ *Parker v. Briscoe*, 8 Taunt. 699; *Monypenny v. Bristow*, 2 Russ. & My. 117; *Haven v. Foster*, 14 Pick. 541. This general doctrine of constructive republication under the old law is traced out in 1 Jarm. Wills, 193-204.

prestige.¹ As for wills of personal property, they rarely needed this borrowed virtue to enlarge their operation, since a residuary bequest carried by its own terms whatever chattels the testator might own at his death.² Codicils in modern times may well be remitted, therefore, to their more obvious and natural purpose. And courts are confirmed in the position long ago taken that if the codicil shows on its face that the testator did not intend to republish, it cannot republish.³

§ 450. **Republication brings down Will to Date.**—The general effect of republication is to make a new will at the date of republication; to bring the old will down to the new date and make it speak from that subsequent time.⁴ Hence to re-execute, or else to execute a new will, destroying the former one, best avoids difficulties of interpretation to which papers of different date may unexpectedly give rise.

Inasmuch as the last will among various ones is the testator's true testament, republication revokes as of its date every former will inconsistent with that which is republished.⁵ But if the will which is republished had codicils added to it, the presumption arises that the testator means to ratify and confirm the will as amended by its codicils, and not otherwise; though the true intent of the transaction should control, if discoverable.⁶ A codicil which republishes

¹ *Supra*, § 29. By Stat. 1. Vict. c. 26, § 3, the power of disposing by will as required by that act is extended to all such real estate as the testator may be entitled to at the time of his death, notwithstanding that he may become entitled to the same subsequently to the execution of his will. And by § 24 a will shall be construed to speak with reference to the real and personal estate comprised in it, from the death of the testator, unless a contrary intent shall appear by the will.

² 1 Jarm. Wills, 193; *Miller v. Brown*, 2 Hagg. 209; 1 Wms. Exrs. 220; *supra*, § 29.

³ See § 447; *Strathmore v. Bowes*, 7 T. R. 482; *Neff's Appeal*, 48 Penn.

St. 501; *Hughes v. Turner*, 3 M. & K. 666.

⁴ 1 Wms. Exrs. 216. A will which is revoked by a second will, and then revived by a subsequent codicil, is to be treated as of the same date as the codicil, and therefore subsequent to the second will. *Jenkins Re*, W. N. (1886) 177.

⁵ *Rogers v. Pittis*, 1 Add. 38; *Walpole v. Cholmondeley*, 7 T. R. 138.

⁶ *Crosbie v. McDoual*, 4 Ves. 610; 1 Wms. Exrs. 217; *Upfill v. Marshall*, 3 Curt. 636; *Wikoff's Appeal*, 15 Penn. St. 281. See 1 Vict. c. 26, § 22, Appendix, upon a point of construction in this connection. Republication does not have the effect of reviving legacies which have been adeemed or satisfied.

as of its own date may ratify and confirm a will in whole or in part.¹

Langdon v. Astor, 16 N. Y. 9; Paine v. Parsons, 14 Pick. 318. Nor in general to effect, by technical construction, a disposition different from what the testator meant. See Linnard's Appeal, 93 Penn. St. 313. A will altered after execution may be republished, together with those alterations, by a codicil annexed and clearly referring to it. 72 Ga. 568; 15 P. D. 216.

¹ Hawke v. Euyart, 30 Neb. 149.

PART V.

WILLS UPON VALUABLE CONSIDERATION.

CHAPTER I.

JOINT AND MUTUAL WILLS.

§ 451. **Wills are Revocable, because of the Nature of a Gift.** — We have, consistently with judicial precedent, pointed out the revocable or ambulatory quality of a will during the testator's lifetime as its cardinal feature.¹ One may make, alter or revoke his own testament at pleasure, generally speaking, so long as he is an existing, capable person ; and courts have for centuries asserted this as an axiom, without occasion to note whether the rule had not after all some qualifications.

But there are qualifications of this rule notwithstanding ; and we apprehend that this revocable quality of a will springs from the deeper postulate that a disposition of property by testament is of the nature of a gift. In the vast majority of cases, indeed almost invariably, the disposition, whether viewed as a whole or with reference to the separate objects of the testator's bounty, is in a genuine sense gratuitous ; the owner regulates the succession to the bulk of his fortune as it may exist at his death, after discharging his debts and obligations ; he considers it lawful for him to do what he will with his own. But the testament operates subject to what his estate may owe, and should his estate prove embarrassed or insolvent the will, though good as an instrument, fails to dispose by its strict tenor. In short, the transfer of an estate by gift is obstructed by claims for legal consideration against that estate.

¹ *Supra*, § 274.

When we say that a testamentary disposition, under this primary qualification, is gratuitous, we mean that there is no binding, no valuable consideration, so far as devise, legacy or bequest may operate. One may give by his will out of affection, friendship, a sense of duty, even gratitude; but so far the motive has nothing stronger than a moral consideration, and the transfer by succession is in the nature of a gift. For this reason it ought to be revocable; for such a testament is in its essence a gift upon condition that the testator shall die without meanwhile altering or revoking the disposition. And such is the condition implied not only in a strict testament, but in a gift *causa mortis*; the oral will and the oral death-bed gift being doubtless the primitive method of individual transfer for posthumous effect.¹ This implied condition in the gratuitous transfer leaves it revocable, wholly or *pro tanto*, at the giver's or disposer's discretion.

§ 452. **But a Will may be upon Valuable Consideration and Irrevocable.** — But a will may be made upon valuable consideration in special instances; and if so, the disposition is no longer in the nature of a gift and gratuitous. Is it then irrevocable? Here is the difficult question with which many of the later cases confront us. Waiving, however, for a moment, the practical solution of a remedy, we answer that such a will loses its revocable character and acquires the binding force of a contract transaction; that the testator is no more capable of varying and regulating that disposition of property at his sole discretion than he was of disposing of his estate so as to give it away over his creditors' heads and regardless of legal demands which might be presented at the settlement of his estate. As a matter of legal principle, then, we must admit that there may be in effect wills revocable and wills irrevocable; that all testamentary dispositions are not absolutely and completely in the nature of a gift by the disposer; that a testator's intention must bend to imperious circumstances which interfere with his free,

¹ See *supra*, § 359; and as to gifts *causa mortis*, 2 Schoul. Pers. Prop. 2d ed. §§ 135, 136, 188.

ambulatory disposition, and mould, partially or it may be wholly, the settlement of the estate which he leaves at his death.

§ 453. **The Rule of Valuable Consideration practically applied; Legacies as Payment for Service, etc.**—This rule of valuable consideration we find practically applied where one renders valuable services on the promise of a legacy. One who boards, nurses, cares for, an aged or feeble person, does so, in many instances, on the promise or expectation of a legacy, or it may be, the whole surplus of the estate. Mere expectation cannot in general create an enforceable contract; but a mutual understanding may, if shown, afford the basis of a valid claim against the indebted person's estate. If the person rendering such a service was promised the legacy by the person he served, and the claim has legal merits and was more than the mere performance of some natural duty to another, the courts afford a practical means of its enforcement. For if the aged or feeble decedent makes no will, or makes a different will from what was agreed upon, or revokes a bequest which was founded upon his own promise, the claim may be presented for settlement, to the whole or partial absorption of the estate, as the case may be. Probate or common law tribunals cannot set aside or ignore the will as an instrument, nor remodel or construct a will to meet the special compact of the parties; but treating the person disappointed of his legacy as a creditor of the estate, they apply a simple and available remedy.¹ And, upon the same principle of a contract obligation on the decedent's part to leave his whole fortune to one who came and took care of him in his declining years, a collateral relative has been permitted to enforce specific performance in equity, so as to sweep in the entire estate over and above the debts, regardless of the dispositions which may happen to be made by the will in favor of others.²

¹ See *Shakespeare v. Markham*, 17 N. Y. Supr. 311, and cases cited; *Schoul. v. Hudson*, 87 Ga. 678; *Newton v. Dom. Rel.* 3d ed. § 274; 11 Phila. 93; *Newton*, 46 Minn. 33. *Wellington v. Apthorp*, 145 Mass. 69; ² *Schutt v. Missionary Society*, 41 N. J. Eq. 115. Here the agreement

But where the amount and mode of compensation had been left to the decedent, and some provision was made accordingly by his will or otherwise, for the person rendering the service, the latter must remain bound by it.¹ And by electing to receive the benefits under the will, such claimant waives his rights under the contract.²

There are other ways in which a will may be disregarded so far as it is inconsistent with a previous contract or covenant. Thus, in a Pennsylvania case, C., after covenanting in a sealed instrument and for a valuable consideration, that he would not by deed, devise or otherwise, interfere with the rights of his heirs-at-law as to their free and equal share in all his real estate, made a will, wherein he devised his real estate to certain heirs, without including his grandson T. therein. It was held that T. was entitled to recover in ejectment his interest as an heir of C.³ On the same general principle an ante-nuptial contract may hinder the free testamentary disposition of a contracting spouse.⁴

§ 454. Contract for a Certain Will specifically enforced in Equity. — Courts of equity have gone farther than this; and the principle, which in the present day appears to be asserted,

was established by correspondence. See next section.

¹ Lee's Appeal, 53 Conn. 363. In considering what is due the disappointed promisee, all proper offsets must be made. Hudson v. Hudson, 87 Ga. 678.

² Towle v. Towle (Wis.) 48 N. W. 800. Nor to such contract, when oral, does the objection of the Statute of Frauds apply; for it is not for the sale of lands or goods, and it may be performed within a year. Wellington v. Apthorp, ib. But any oral contract to devise all one's property, real and personal, to a certain person, *semble*, would be obnoxious to the Statute of Frauds. Ib. Ellis v. Cary, 74 Wis. 176. Cf. Burgess v. Burgess, 109 Penn. St. 312. See next section. And any oral agreement of this kind should at all events be clearly proved. Burgess v. Burgess, ib.; McKeegan v. O'Neill, 22 S. C. 454; Mad-

dison v. Alderson, 8 App. Cas. 467; Davis v. Hendricks, 99 Mo. 478; 6 Dem. 473; 31 S. C. 605; 74 Wis. 176; Rice v. Hartman, 84 Va. 251.

The obligation to remunerate for such services, as promised, is not impaired, although the consideration is to be wholly or in part in the future, and though the person to whom the promise was made remains under no binding, mutual obligation on his part. C. Allen, J., in 145 Mass. 69.

A written contract to bequeath one-half of one's estate to A. is not void for uncertain description. Koebl v. Haumesser, 114 Ind. 311.

³ Taylor v. Mitchell, 87 Penn. St. 518. See also, as to a bond conditioned to leave a certain farm by will, Major's Appeal, 126 Penn. St. 109. And see 124 N. Y. 433; 46 Minn. 33.

⁴ Cole v. Society, 64 N. H. 445.

is, that where one contracts upon valuable consideration to execute a will after a certain tenor, the agreement is binding upon his death, and may be specifically enforced against his representatives and his estate.¹ For a trust is thus fastened upon the property of the promisor which binds the estate at his death. Nevertheless a devisee comes within the legal definition of one who takes by purchase; and hence to an oral contract of this character, the Statute of Frauds may be pleaded;² and it is possible that other technical objections may be raised under the Statutes of Wills. An adopted child, who, in consideration of adoption, was promised all the testator's property at his death, has been recently permitted to enforce specific performance out of the estate, to the subversion of a will;³ but not where the decedent's promise

¹ *Walpole v. Orford*, 3 Ves. 402; *Caton v. Caton*, L. R. 1 Ch. 137; s. c. L. R. 2 H. L. 127; *Gould v. Mansfield*, 103 Mass. 408; *Anding v. Davis*, 38 Miss. 574; 11 Ired. 632; *Izard v. Middleton*, 1 Desaus. 116; *Day, Ex parte*, 1 Bradf. 476, and cases cited; *Bolman v. Overall*, 80 Ala. 451; *Carmichael v. Carmichael*, 72 Mich. 76; 73 Mich. 483.

² *Walpole v. Orford*, 3 Ves. 402; *Harder v. Harder*, 2 Sandf. Ch. 17. The want of part performance in a contract to sell land may thus be set up. *Gould v. Mansfield*, 103 Mass. 408; *Ellis v. Cary*, 74 Wis. 176. But part performance by the testator may sometimes be shown, so as to take the case out of the Statute of Frauds. *Sharkey v. McDermott*, 91 Mo. 647. Part performance by the promisee alone is insufficient. *Ellis v. Cary*, 74 Wis. 176. Where the promise is to devise and bequeath all of one's real and personal property, it is indivisible; and failing as to the real property, it fails also as to the personal. *Ib.* See *Bird v. Pope*, 73 Mich. 483. But though the oral agreement may not be enforceable, the value of one's services rendered in consideration may be recovered. See § 453; *Stevens v. Lee*, 70 Tex. 279.

An agreement to leave property to

several persons by will, share and share alike, is several as to each of the promisees, and they cannot join in enforcing it. *Myers v. Cronk*, 45 Hun, 401. Probate proceedings, in the allowance of claims against an estate, must be distinguished from specific performance in equity. *Ib.* And the executor should be made a party to any such proceedings for subverting the provisions of a will. *Cole v. Society*, 64 N. H. 445; 58 Hun, 610.

"If, then, the agreement be specifically enforceable against the defaulting party's representatives, it would seem that it might have been enforceable against the party himself during his lifetime; refusal or attempted revocation as to that party not being ground merely for an action for breach of contract. Hence there is here in effect a case of an irrevocable will, whether the agreement be carried out or not." 1 *Jarm. Wills*, 18 Am. ed., note by Bigelow.

Where a husband and wife are duly empowered to dispose of an estate by will, and they jointly make and duly execute a will, it is not in the power of either, by a separate act, to revoke that will. *Breatwitt v. Whittaker*, 8 B. Mon. 530.

³ *Sharkey v. McDermott*, 91 Mo. 647.

extended only to treating the adopted child like a natural one.¹

Positive decisions enforcing the specific performance of an unexecuted will are scarcely to be found. But in equity a will which is once formally made in conformity to some agreement may be upheld as originally executed on the strength of some valuable consideration therein interposed; the effect of which might possibly be to make the will practically irrevocable, unless some matter of form, some technical arbitrary rule springing out of the statute, or the necessary form or construction of the will should defeat what the parties had mutually intended.² There is nothing unlawful in such a compact, nothing contrary to good morals.³

§ 455. **Joint or Mutual Wills.**—It is under the head of joint or mutual wills that our courts often discuss this irrevocable quality of a will under those exceptional circumstances which import a valuable and reciprocal consideration. And it is here courts of equity take up the difficult problem of enforcing a specific performance, so to speak, of the testamentary disposition, or rather of a testamentary compact, involving the making of the joint or mutual will in accordance with the mutual agreement of the parties. One promises to make a will of all his property in favor of a second person, who in consideration thereof agrees to make a similar will in favor of the first: the advantage thus to accrue being to such of the two as may happen to survive the other. Or the joint consideration may relate to a disposition in favor of third persons; though here, as we shall see, courts are not so well disposed to enforce the cumbrous arrangement.

¹ Davis v. Hendricks, 99 Mo. 478. And see Snyder v. Snyder, 77 Wis. 95, where specific performance was refused. Cf. Austin v. Davis (Ind.) 26 N. E. 890.

² Bradford Surrogate in Day, *Ex parte*, 1 Bradf. 467; cases cited in next section; Schumacher v. Schmidt, 44 Ala. 454. As to a will given upon some consideration by way of an independent

covenant, see Armstrong v. Armstrong, 4 Baxt. 357. That transactions for posthumous effect are not usually wills if of a revocable character, see *supra*, § 274; 97 Penn. St. 313.

³ 1 Bradf. 467. See the late case of Bolman v. Overall, 80 Ala. 451, where an executed will was in fact delivered.

§ 456. **The Same Subject; Joint or Mutual Wills as to Probate.** — When these mutual or conjoint wills first came up in practice, the common law and spiritual courts of England pronounced against them. A mutual or conjoint will, it was said, is unknown to the testamentary law of this country.¹ These courts saw, doubtless, that to give the contract under which such wills were made a practical operation as mutually intended was beyond their own jurisdiction; and regarding the instrument simply as a will the irrevocable nature of such a writing interposed to their minds a strong ground of objection. The same unfavorable position is taken by some of our earlier American cases.²

But the later and better opinion, in both England and the United States, treats the conjoint or mutual will as capable of probate, provided it has been executed with all the statute formalities requisite for other wills, and has not been revoked by some later instrument. The real point of decision by Sir John Nicholl in *Hobson v. Blackburn*³ (the leading case adverse to such wills) was that such an instrument, though jointly executed, could not be set up in probate against the later will of one of the parties which revokes his share of the mutual disposition; in other words it only denied the theory that joint wills were irrevocable, in the strict testamentary sense, unless by the joint or mutual concurrence of the testators. Joint dispositions of property, under a testamentary instrument, are, therefore, though irrevocable in equity as a compact, revocable as a will by either testator in the usual manner so far as relates to his own disposition. But, on the other hand, if either testator dies without revoking his disposition, the will may be admitted to probate as his last and separate will, on proof of due execution as in other cases, notwithstanding some one else executed and disposed of property by the same instrument.⁴ Hence a conjoint or

¹ 1 Wms. Exrs. 10, 124; *Darlington v. Pulteney*, 1 Cowp. 268, *per* Lord Mansfield; *Hobson v. Blackburn*, 1 Add. 277, *per* Sir John Nicholl.

² *Clayton v. Liverman*, 2 Dev. & Bat. 558, Daniel, J., dissenting.

³ *Hobson v. Blackburn*, *supra*. And see *Schumacher v. Schmidt*, 44 Ala. 454.

⁴ *Stracey*, Goods of, Dea. & Sw. 6; *Lovegrove*, Goods of, 2 Sw. & Tr. 453; L. R. 4 P. C. 236; *Diez Re*, 50 N. Y. 88; *Dufour v. Pereira*, 1 Dick. 419; *Day*,

mutual will, is not necessarily invalid, even when viewed for probate merely and in the simple sense of a testament.¹ That the will happens to be made in conformity to some agreement, or imports on its face a mutuality of testamentary purpose, and a compact not to revoke without a joint assent, does not defeat its character as a will.²

§ 457. **The Same Subject: Some Cases show Reserve and attempt Distinctions.** — But some of the cases which concede that such complex wills may pass to probate, discuss the doctrine with reserve and attempt some distinctions; shrinking evidently from sanctioning methods of disposition so unusual, beyond what the necessities of the case actually called for. Hence the law of mutual wills is still in a somewhat confused state, regarded as a doctrine of general jurisprudence. While admitting that two or more persons may execute a joint will capable of operating as if executed separately by each testator, and requiring a separate probate on the death of each, some cases appear to confine the rule to wills which are to operate exclusively in favor of the survivor. They refuse to extend the rule so as to admit to probate a will which treats the separate property of each owner as a joint fund and bequeaths or devises in favor of third parties.³ The reciprocal or mutual will, it is said, amounts simply to the separate will of the first decedent; but the joint will which disposes to third parties is more complicated and ought not to be admitted to probate.⁴

Ex parte, 1 Bradf. 467; *Evans v. Smith*, 28 Ga. 98; *March v. Huyter*, 50 Tex. 243; *Schumacher v. Schmidt*, 44 Ala. 454.

¹ *Ib.*

² This whole subject is discussed with masterly force by Bradford Surr. in Day, *Ex parte, supra*, and the doctrine of the text is broadly asserted. Reciprocal wills seem to be sanctioned by the civil law. *Ib.*; Domat, pt. 2, lib. 3, tit. 1, § 8, art. 20. Under the Louisiana code "unity of confection" is prohibited; but as to how far this applies, see *Wood v. Roane*, 35 La. Ann. 865.

³ *Lewis v. Scofield*, 26 Conn. 452; *Evans v. Smith*, 28 Ga. 98.

⁴ *Walker v. Walker*, 14 Ohio St. 157. And see observations of court in *Schumacher v. Schmidt*, 44 Ala. 454; 35 La. Ann. 865.

The following serves as an example of a good mutual will, jointly executed. Two sisters, J. and P., signed a duly attested instrument, substantially as follows: "Know all men that we, J. and P., do covenant and agree that, for the love we bear to each other, whichever of us be the longest lived shall be th-

Such a distinction appears to lose sight of the vital element to such transactions, namely, a valuable and mutual consideration interposed; it rests rather upon the view that such complex wills are impolitic and only admissible in law under a qualification. But we must conclude that, at the present stage of our law, the reciprocal or mutual will of two or more testators stands on a stronger footing than joint wills, or those joint wills at least which are expressed for the benefit of non-executing parties.

§ 458. **A Will jointly executed which disposes only of one Person's Property is not a Joint Will.** — If the property disposed of by a testament belongs to one only of the executing parties, the mere joinder of another in the execution does not make the instrument what the law terms a joint or mutual will. As where, for instance, a husband and wife join in devising real estate by a will of which the husband was the sole owner.¹ Such a will, though joint in form, must be regarded as the will of the party who owns the property, and the execution of the non-owner is mere surplusage.

§ 459. **Where Probate must be delayed until Both or All Testators die.** — Where the transaction we are considering is such that the joint or mutual disposition cannot take the effect intended until both or all of the testators die, public policy receives a ruder shock. The probate courts of England and some of our States, however, stand by the consequences, and pronounce that probate must be delayed in such a case until both or all of the testators die.² But delicate and important questions in this connection remain unanswered; as, for instance, how the first decedent's estate shall

heir of the other." *Evans v. Smith*, 28 Ga. 98. And see *Lewis v. Scofield*, 26 Conn. 452. A will like this, it is suggested, construed according to the legal effect of its language, undertakes only to operate on the will of the sister who should first die, and only upon her estate; and predecease without revocation settles the disposition. In *Diez Re*, 50 N. Y. 88, husband and wife

devised reciprocally to each other by such a will. And *Betts v. Harper*, 39 Ohio St. 639, supersedes *Walker*, 14 Ohio St. 157, as to the impolicy of joint wills.

¹ *Rogers*, Appellant, 11 Me. 303; *Allen v. Allen*, 28 Kan. 18.

² *Raine Re*, 1 Sw. & Tr. 144. And see *Schumacher v. Schmidt*, 44 Ala. 454.

meantime be settled and disposed of and whether a title can in any sense devolve under his will. In Ohio the latest decisions give a heartier support to the policy of joint wills than formerly; and it is held that tenants in common of land, owning personal property in severalty, may make a joint will disposing of all their property severally, which will take effect on the death of all.¹

But according to the view taken in Arkansas a joint will conditioned to take effect upon the death of both is invalid; and a will must take effect at the testator's death and not at a more remote period.²

§ 460. **Joint or Mutual Will conditionally expressed.**—Where a joint will is expressed to take effect conditionally or upon a contingency, and the contingency does not happen, the joint will is inoperative even to revoke a previous will.³

¹ *Betts v. Harper*, 39 Ohio St. 639. So far as *Walker v. Walker*, 14 Ohio St. 157, intimates that the policy of Ohio is opposed to joint wills, it is here reversed. In the present case the two testators desired to devise to A. and B. the undivided share which each had in the real estate. They could have executed separate wills, but preferred to make a joint will. This instrument was, in effect, the separate will of each, and either one might have revoked it so far as it was her will. On the death of the first testator, the instrument might have been admitted to probate as her will; on the death of the other it might have been admitted as the will of that person; but not being offered at all until the death of both testators, it was properly admitted to probate as the will of each and both.

In Kentucky a joint will executed by two brothers, who died a few years apart, was admitted in probate as the

will of each in turn, and afterwards pronounced a valid instrument. *Hill v. Harding* (Ky.), 17 S. W. 199.

² *Hersby v. Clark*, 35 Ark. 17. And see *supra*, § 293. It is also suggested in this case that neither law nor equity ought to enforce a contract as irrevocable which allows one not only to denude himself of all control of all he then possesses, but also of all that he may afterwards acquire.

³ *Hugo, Goods of*, 2 P. D. 73. Here husband and wife executed a joint will, which was expressed to take effect in case they should be called out of the world at one and the same time, and by one and the same accident. The husband died in the life-time of the wife, and it was held that the contingency did not happen.

As to the joint or mutual wills of husband and wife, see also § 62; *Alter's Appeal*, 67 Penn. St. 341; *Wyche v. Clapp*, 43 Tex. 543.

PART VI.

CONSTRUCTION OF WILLS.

CHAPTER I.

GENERAL RULES OF TESTAMENTARY CONSTRUCTION.

§ 461. **Modern Precedents Many; Deeds and Wills compared.**—The great and growing host of cases confronting us in the reports, which involve the interpretation and effect of particular testaments and testamentary provisions, by no means betokens a concretion into well-ordered principles. It is rather a multitude of precedents without array; each serving its own capricious purpose except for some lesser rules of constraint. So long as the world lasts, those diversely interested will dispute the meaning of written phrases on which turn their several pecuniary rights; and no writings can be more fruitful of litigation, unless the tie of family binds fast, than those mysteriously framed and unexplained by which the dead has sought to place fetters upon the living; the more so, that men reputed among the wisest of their day in affairs, have left wills behind them the strangest, the most ambiguous, the most carelessly drawn of all documents. The law itself fosters uncertainty in such cases by refusing to subject this class of instruments to rigid rules of construction, but making what it may of a testator's language, be it as slovenly and illiterate as it may; our policy being to give the greatest possible scope to each dying owner's wishes, provided he executed his will with due formalities. Indeed, without family dissension at all, resort is often had to the court to determine how the particular will shall be construed, so as to enable executors and trustees to perform their duties intelligently.

There exists, then, this striking difference between deeds

and wills; that deeds, and most especially deeds of real estate, employ a precise phraseology, whose meaning is well defined by the courts and adhered to in common practice; whereas wills may vary in expression as well as idea, according to the governing ideas of each testator. Deeds pursue a certain form familiar to professional advisers; while wills on the other hand are often drawn up in contempt of professional advice, and may employ terms as informal as a private letter or business memorandum; many a disposer, in fact, flattering himself that simple words make one's meaning the clearer. This peculiar indulgence of our law to wills, Lord Kenyon and other judges have openly regretted;¹ but modern courts show no disposition to withdraw it, preferring on the whole the risk of increased uncertainty and litigation to that of perverting one's disposition, on technical grounds, from what he obviously intended. Deeds and verbal precision, too, we associate with transfers of land; while wills which pass the title to the bulk of one's estate, to his property, both real and personal, demand the widest latitude of expression.

§ 462. **Rules of Testamentary Construction are of Limited Scope.** — In wills, therefore, a testator's meaning is the great criterion, so far as mere interpretation is concerned. What he intended the courts strain to discover. There are rules, those which restrain perpetuities, for instance, or forbid mortmain, which must operate above and independently of any testator's intention, upon reasons of sound policy; but a mere rule of testamentary construction embodies a simple presumption, and no more, namely, that the testator intended one disposition rather than another or any other. Hence is it that a court may lay it down, in case of doubt, that the testator probably meant to dispose after a certain fashion, since otherwise he would have transgressed the rule against perpetuities, mortmain, or the like, and defeated his own intention. Our rules of construction determine, then, the construction which courts are bound to put upon particular

¹ Lord Kenyon in *Denn v. Mellor*, 5 T. R. 558, 561.

words, phrases, and forms of testamentary disposition, in question, in the absence of one's sufficiently declared intention to the contrary.¹ A testator cannot override rules founded in policy; but any mere rule of construction may be overborne by the well-declared purpose of his will.

It follows that in our modern practice, English and American, these rules of testamentary construction have but a limited and subordinate application. They come chiefly into play where the testator has omitted matters of detail not affecting the vital character of the instrument, or where he has employed some careless and ambiguous expression which requires to be toned or explained; but in general questions where the whole frame and language bear upon the particular construction, such rules are of little practical avail.² Certain words and expressions, when standing unexplained, acquire from these precedents a somewhat definite meaning; but if it could once be a question whether or not technical phrases should conclude a testator's intention, it is no longer doubtful that his intention is paramount. The same literal expressions in two wills might demand the same construction; but unless the two wills are identical throughout and dispose of similar fortunes under similar circumstances (as can seldom happen), a precedent fails of its full force. New kinds of property, moreover, have come into existence; new and complex modes of transfer and disposition attend the modern advance of society; and under any and all circumstances the language of wills may be presumed to express the sense of the testator according to his own age and surroundings, rather than any permanent or universal meaning.

§ 463. **The Same Subject.** — A bias at one time in favor of the precedents of construction and at another against

¹ See Hawkins's Construction of Wills, preface. "A rule of construction," observes this careful writer, "may always be reduced to the following form: certain words or expressions, which may mean either *x* or *y*, shall, *prima facie*, be taken to mean *x*. A rule of construction always contains the saving clause, 'unless a contrary intention appear by the will'; though some rules are much stronger than others, and require a greater force of intention in the context to control them." *Ib.*

² 2 Jarm. Wills, 838.

them may be gathered from the language of courts and text-writers on this subject. Jarman, a respected authority, while deploring that license of construction which sets up the intention to be collected upon arbitrary notions as paramount to the authority of cases and principles, takes care to remind his readers that while courts speak of the testator's intention as the governing principle, the judges submit to be bound by the precedents and authorities in point, and endeavor to collect the intention upon grounds of a judicial nature as distinguished from arbitrary occasional conjecture. "The court," observes an English judge, "must proceed on known principles and established rules, not on loose conjectural interpretations, or by considering what a man may do in the testator's circumstances."¹ But, after all, authority in the mere verbal interpretation of wills carries no great weight, especially if the words and tenor of the whole will are not absolutely identical.² The construction given to a verbal expression in one will is no positive criterion for all wills containing the same expression.³ And one of the most eminent American judges of our times, impressed with the inefficiency of the adjudged cases as guides in the construction of wills, has doubted whether any other source of enlightenment on this subject is of much assistance than the application of natural reason to the language of the instrument under the light which may be thrown upon the intent of the testator by extrinsic circumstances surrounding its execution and connecting the parties and the property devised with the testator and with the instrument itself.⁴

It is not improbable that in England, where so much of the property upon which wills operate, is fettered by entails and settlements, more respect would naturally be paid to prece-

¹ *Ib.*, citing Henley, L. K. 1 ed. 43.

² See 6 H. L. Cas. 108; 4 Ch. D. 68.

³ *Smith v. Bell*, 6 Pet. 68; *per Marshall, C. J.*

⁴ Mr. Justice Miller, in *Clarke v. Boorman*, 18 Wall. 493. "No two wills, probably, were ever written in precisely the same language throughout; nor do any two testators die under the same

circumstances in relation to their estate, family, and friends. And it would be very unsafe, as well as unjust, to expound the will of one man by the construction which a court of justice had given to that of another, merely because similar words were used in particular parts of it." Taney, C. J., in *Bosley v. Bosley*, 14 How. 390, 397.

dents of construction than in the United States, where the transmission of property is comparatively free.¹ But even in England, as Jarman admits in his summary after carefully collating the precedents of the English courts, many of the so-called rules of construction involve uncertainty in their application to particular cases, while in a few instances the rules themselves are still subjects of controversy.² The Statute 1 Vict. c. 26 has settled many questions in that country regarding real estate, and yet precedents of testamentary construction rapidly encumber the reports.³

§ 464. **Difficulty of applying Rules of Interpretation.** — Judge Story, while inculcating the duty of respecting precedents, wherever the intention of a testator is to be searched out and fixed, and those precedents more especially on which depend the foundation of wills to real estate, has declared his own conviction that the difficulty of construing wills in any satisfactory manner renders this one of the most perplexing branches of our law. "The cases," to use his own words, "almost overwhelm us at every step of our progress; and any attempt even to classify them, much less to harmonize them, is full of the most perilous labor. Lord Eldon has observed that the mind is overpowered by their multitudes, and the subtilty of the distinctions between them."⁴ To lay down any positive and definite rules of universal application in the interpretation of wills, must continue to be, as it has been, a task, if not utterly hopeless, at least of extraordinary difficulty. The unavoidable imperfections of human language, the obscure and often inconsistent expressions of intention, and the utter inability of the human mind to foresee the possible combinations of events, must forever afford an ample field for doubt and discussion, so long as testators are at liberty to frame their wills in their own way, without being tied down to any technical and formal language. It ought not, therefore, to surprise us, that in this branch of the law the words used should present an infinite variety of combina-

¹ See 1 Redf. Wills, 423.

² Jarm. Wills, 839.

³ Ib.

⁴ *Jesson v. Wright*, 2 Bligh, 50.

tions, and thus involve an infinite variety of shades of meaning, as well as of decision.”¹ Time adds to the force of these utterances which were made from the bench more than half a century ago.

“Of all legal instruments,” to quote from Justice Miller, “wills are the most inartificial, the least to be governed in their construction by the settled use of technical legal terms, the will itself being often the production of persons not only ignorant of law but of the correct use of the language in which it is written.”²

§ 465. **Construction aided or unaided by Extrinsic Evidence; the Latter here considered.** — The construction of any will may, according to the special circumstances, be treated as aided or unaided by extrinsic evidence. It is the latter case, and the usual one, to which this chapter must be confined; and we may observe that the general rule of our law excludes parol evidence of what the testator actually intended, except in equivocal and ambiguous cases to be noted hereafter.³ A will in modern times is a written instrument; and the interpreter of such an instrument must draw his conclusions from an accurate study of the document itself, unaided by external testimony.⁴ For what the instrument, once admitted to probate, says plainly upon its own face is not to be disputed by evidence *aliunde*.

§ 466. **Cardinal Rule that Testator's Intention shall prevail.** — The cardinal rule of testamentary construction, as already intimated, is that the plain intent of the testator as evinced by the language of his will must prevail, if that intent may be carried into effect without violating some deeper principle of public policy. And whatever respect the construction put upon corresponding words in other wills may deserve from

¹ Mr. Justice Story in *Sisson v. Seabury*, 1 Sumn. 235, 239 (1832).

² *Clarke v. Boorman*, 18 Wall. 493.

³ See c. 3, *post*.

⁴ Mr. Hawkins in 2 Jurid. Soc. Papers, 298, contends that the rule which

excludes parol evidence in aid of interpretation is not, as high English authorities maintain, a necessary result of the requirement of a written will, but that Roman jurisprudence proves the contrary.

the court by way of precedent, this plain and lawful intent of the particular will should not be defeated. Courts have spoken of such intention as the "law," the "pole star" or the "sovereign guide" when referring to this governing principle of testamentary causes;¹ and the doctrine, in one formula or another, is constantly affirmed in the reports.

But it is the intention of the testator as expressed in his own will which governs; and this intention must be discerned through the words of the will itself, as applied to the subject-matter and the surrounding circumstances.² In other words, the plain and unambiguous words of the will must prevail and cannot be controlled or qualified by any conjectural or doubtful constructions growing out of the situation, circumstances or condition of the testator, his property or the natural objects of his bounty.³ And since the interpretation and expositions of certain phrases found in similar wills, are entitled to weight,⁴ it may sometimes happen that the intention as expounded by the courts differs from the testator's own private intention and understanding.

Yet every will should be interpreted, as far as possible, from the standpoint apparently occupied by the testator; and attendant circumstances, such as the condition of his family and the amount and character of his property, may and ought to be taken into consideration, as part of the *res gestæ* where the language is not plain nor the meaning obvious.⁵ And the testator's intention ought at least to control any arbitrary rule, however ancient its origin, which is unreasonable or not well established or doubtful in its immediate application.⁶ But if there are two intentions on the face of the will, one of which is general and consistent with the rules of law, and another

¹ Lord Hale in *King v. Melling*, 1 Vent. 231; *Willmot, C. J.*, in *Doe v. Laming*, 2 Burr. 1112, and *Roe v. Grew*, 2 Wils. 322; *Summit v. Yount*, 109 Ind. 506; 31 Fed. 241.

² 1 Redf. Wills, 433; 2 Jarm. Wills, 838; *Parsons v. Winslow*, 6 Mass. 175; *Christie v. Phyfe*, 19 N. Y. 344; *Williamson v. Williamson*, 4 Jones Eq. 281.

³ *Ib.* And see 2 Wms. Exrs. 1078; *Greenough v. Cass*, 64 N. H. 326.

⁴ *Supra*, § 463.

⁵ *Smith v. Bell*, 6 Pet. 68; *Blake v. Hawkins*, 8 Otto, 315; *Brown v. Thorndike*, 15 Pick. 388; *Postlethwaite's Appeal*, 68 Penn. St. 477; *Sisson v. Seabury*, 1 Sumn. 235; *Perry v. Hunter*, 2 R. I. 80; *Brown v. Bartlett*, 58 N. H. 511.

⁶ *Shriver v. Lynn*, 2 How. 43; *Lord Mansfield in Perrin v. Blake*, 4 Burr. 2579.

special and inconsistent with the rules of law, the latter yields to the former, and if necessary to give effect to the will may be rejected altogether.¹

§ 467. **The Same Subject.** — “The struggle in all such cases,” observes Judge Story, “is to accomplish the real objects of the testator, so far as they can be accomplished consistently with the principles of law; but in no case to exceed his intention fairly deducible from the very words of the will.”² In fine, where the meaning of the language of the will is plain, the court of construction does not go outside to discover what the testator intended; but where the provisions are doubtful or may admit of more than one interpretation, the court will put itself in the situation of the testator, in reference to the property and the relative claims of the testator’s family, the relations subsisting between him and them, and the circumstances which surrounded him, in order to be enlightened. And herein lies the distinction between the admission and the non-admission of extrinsic evidence to aid in interpreting a given will.³

§ 468. **The Whole Will must be taken together.** — A testator’s intention is, however, to be collected from the whole will taken together, and not from detached portions alone.⁴ For, as it is figuratively said, the meaning must be gathered *ex visceribus testamenti*, or to use another familiar expression, “from the four corners of the instrument.” All the papers which constitute the testamentary act must be taken as one whole, embracing will and codicils, and all papers so referred to as to be incorporated with the same in the probate.⁵ And all the parts and provisions of a will are to be construed in

¹ Mr. Justice Story in *Nightingale v. Sheldon*, 5 Mason, 336.

² *Nightingale v. Sheldon*, 5 Mason, 336. And see *Blagge v. Miles*, 1 Story, 426; *Fenwick v. Chapman*, 9 Pet. 461; *Smith v. Bell*, 6 Pet. 68.

³ See *post*, c. 3.

⁴ *Lane v. Vick*, 3 How. 464; *Cook v. Weaver*, 12 Ga. 47; *Jackson v.*

Hoover, 26 Ind. 511; *Parker v. Wasley*, 9 Gratt. 477; 2 Jarm. Wills, 841; 9 Mod. 154; 2 W. Bl. 976; 103 Ill. 11; *Hoxie v. Hoxie*, 7 Paige, 187; *Nightingale v. Sheldon*, 5 Mason, 336; *Jackson v. Kip*, 2 Paine, 366.

⁵ *Westcott v. Cady*, 5 Johns Ch. 343; *Leavens v. Butler*, 8 Port. 380.

relation to each other, and so as, if possible, to form one consistent whole and operate together;¹ and contradictory clauses should, if possible, be reconciled accordingly.

But where the language of one part of a will is not easily reconciled with that used in another, principal and subordinate provisions should be construed in their due relation to one another. Thus, the intent which is disclosed in the express clause of a bequest ought to prevail over the language used in making other provisions subsidiary to this bequest; unless plainly modified or controlled thereby.² And a clearly expressed intention in one portion of the will is not to yield to a doubtful construction, in any other portion of the instrument.³

Hence, too, in interpreting a will the testator's general and controlling purpose should be regarded, rather than any exalting and exciting ideas which may have dictated the terms of his will.⁴ It is not by an exaggerated expression here and there that the will is expounded, but by what on the whole was one's scheme of rational disposition. For the intent as gathered from the whole will overrides all those technical rules which relate to the construction of words.

§ 469. **Language taken according to the Testator's Situation.**—Here let us observe, of the testator's language, that the rule which seeks to discover one's real intention requires that language be taken, so far as may be, according to the testator's own situation and surroundings; according to the time and place in which he lived, and the manners and institutions which moulded his character or to which on the whole he had the most probable reference. For the language of wills, as courts have observed, is not of universal interpretation, having the same precise import in all countries and under all circumstances; but they are commonly supposed to speak the sense

¹ 2 Jarm. Wills, 841; 9 Mod. 154;
6 T. R. 314; 16 Ves. 314; 82 Penn.
St. 213.

³ *Corrigan v. Kiernan*, 1 Bradf.
208.

² See *Curtis, J.*, in *Ward v. Amory*,
1 Curt. 419; § 478, *post*.

⁴ *McDonough v. Murdock*, 15 How.

of the testator according to the received laws or usages of the country where he is domiciled, by a kind of tacit reference; supposing, of course, that there is nothing in the language he uses which repels or controls such a conclusion.¹

In general the intent of a testator must be gathered not merely from the language used in the will, but from that language in connection with the law of the land.²

§ 470. **Technical Words; how far controlled by Testator's Intent.** — Consistently with this general regard to language, technical words employed in a will are presumed to have been used in their settled legal meaning unless the contrary is manifest.³ And if a testator has used technical language which brings his case within some precise rule of law, that rule must take effect. But technical words are liable to other explanatory and qualifying expressions in the context which disclose the testator's actual intention;⁴ and where a different meaning is fairly deducible from the whole will, the technical sense must bend to the apparent intention.⁵ In short, the testator's intention as gathered from the will shall prevail against the technical meaning of words or phrases, so far as may consist, at least, with the rules of sound policy, and however imperfectly such intention was in a technical sense expressed.

To illustrate these distinctions. When a trust is created, the legal effect of which is declared by the law, the court is bound to presume that the intent of the testator was in conformity to that law.⁶ And specific words, especially in real estate titles, acquire readily the technical effect which usage and the decisions sanction.⁷ Yet the word "effects" has

¹ *Harrison v. Nixon*, 9 Pet. 483. Thus the word "heir-at-law" might not present precisely the same idea to an American as to an Englishman.

² *Pennoyer v. Sheldon*, 4 Blatch. 319; *Phill. (N. C.) Eq.* 8; *Clark v. Mosely*, 1 Rich. Eq. 396.

³ *Doug.* 340; 4 *Ves.* 329; 6 *Ch. D.* 496; *Needham v. Ide*, 5 *Pick.* 510; *De Kay v. Irving*, 5 *Denio*, 646; *Feltman v. Butts*, 8 *Bush.* 115; *Jackson v. Kip*, 2 *Paige*, 366; 2 *Jarm. Wills*, 842.

⁴ *Picquet v. Swan*, 4 *Mason*, 443; *Robertson v. Johnston*, 24 *Ga.* 102; *Daniel v. Whartenby*, 17 *Wall.* 639.

⁵ *Nightingale v. Sheldon*, 5 *Mason*, 336, *per Story, J.*; 2 *Wms. Exrs.* 1079; *Suydam v. Thayer*, 94 *Mo.* 49.

"Unmarried" may thus be construed to mean "not under coverture" at the time referred to. *W. N.* (1890) 125.

⁶ *Pennoyer v. Sheldon*, 4 *Blatch.* 319.

⁷ 8 *Mass.* 3; 5 *Pick.* 510; 47 *Barb.* 263.

been held to embrace both real and personal property under a will and to carry a fee simple in lands, without other words of inheritance, where the will shows on the whole that such was the testator's meaning.¹ From a similar consideration, the words "residuary legatee" have been held to carry real estate;² the word "heir" has been construed to mean child;³ "legatee" has from the context been read as "devisee";⁴ and intent has controlled as to making "bequest" and "devise" synonymous.⁵ In determining whether a word is used in a will in a technical or more general sense, it should be considered what will best carry into effect the testator's intention;⁶ but as a rule language should be construed according to its primary and ordinary meaning, unless the testator has manifested his intention in the will to give it a different significance.⁷

§ 471. **Technical Words not Necessary; Words occurring more than once.**—Technical words are not requisite to give effect to any species of disposition in a will;⁸ but the intention of the testator as discerned in the will is to govern in its construction, if consistent with the rules of law, though no technical words be used at all.⁹

For convenience in laying hold of the testator's true meaning, it has been ruled that words occurring more than once in a will shall be presumed to be used always in the same sense, unless the context shows a contrary intention.¹⁰ But the presumption thus afforded appears a slight one as against the apparent intention, which after all is the criterion.

§ 472. **Words to be taken in Usual Sense, etc.**—Words in general, whether technical or popular, are to be taken in their plain and usual sense, unless a clear intention to use

¹ Hogan v. Jackson, Cowp. 299; Ferguson v. Zepp, 4 Wash. 645.

² Burwell v. Mandeville, 2 How. 560.

³ Bland v. Bland, 103 Ill. 11.

⁴ Weeks v. Cornwell, 106 N. Y. 626.

⁵ Thompson v. Gaut, 14 Lea, 310.

⁶ 15 N. J. L. 276.

⁷ Hone v. Van Schaick, 3 N. Y. 538; 1 Johns. Ch. 220; 10 S. & R. 150.

⁸ 3 T. R. 86; 11 East, 246; 2 Jarm. Wills, 840.

⁹ Richardson v. Noyes, 2 Mass. 56; Smith v. Bell, 6 Pet. 68; and numerous other cases cited, U. S. Dig. 1st series, Wills, 1524.

¹⁰ See 1 Jarm. Wills, 842; 2 Ch. Cas. 169; 3 Drew, 472.

them in another sense can be collected and that sense ascertained besides.¹

§ 473. **Courts give Effect if Possible to All Parts of a Will.**—A court is bound to give effect to every part of a will, without change or rejection, provided an effect can be given to it, not inconsistent with the general effect of the whole will taken together.² And where effect cannot, consistently with the rules of law, be given to an entire will, or to an entire provision therein, any part of it which conforms to such rules will be sustained, if it can be separated from the rest of the will without violating the testator's general intention. Thus, if the testator expresses a general primary intention which conforms to the law, ulterior limitations by which he seeks to establish a perpetuity may be dropped, as not affecting the validity of the primary disposition of his estate.³ Invalid ulterior limitations will not invalidate the primary dispositions of a will.⁴ And where a testator's intention cannot wholly operate, it must be allowed to operate as far as possible.⁵

§ 474. **Later Clause, how construed with an Earlier One.**—A later clause in a will must be deemed to affirm, not to contradict an earlier clause, if such construction can fairly be given. The effort here, and a natural one, is to reconcile the instrument in all its parts and make the disposition a consistent whole; for in construing doubtful language that interpretation should be preferred which gives consistency to the whole will, rather than one which works inconsistency. Ambiguous expressions, therefore, though capable of limiting a plain gift already made, will not be readily allowed this effect.⁶ And on the other hand, an express limitation in a

¹ 18 Ves. 466; 4 C. B. N. S. 790; 2 Ill. 276; *Dalton v. Scales*, 2 Ired. Eq. Jarm. Wills, 841; 2 Demarest, 534; 521; 108 Penn. St. 314.
Barney v. Arnolds, 15 R. I. 78.

² *Dawes v. Swan*, 4 Mass. 208; 6 ³ *Oxley v. Lane*, 35 N. Y. 340.
 Mass. 169; *Dill v. Dill*, 1 Desaus. 237; ⁴ *Tiers v. Tiers*, 98 N. Y. 568.
Mutter's Estate, 38 Penn. St. 314; 2 ⁵ *Finch*, 139; 2 Jarm. Wills, 843;
Lepage v. McNamara, 5 Iowa, 124.

⁶ *Temple v. Sammis*, 97 N. Y. 526.

bequest or devise should not be controlled by implications drawn from other provisions in the will, if the latter by any fair intendment can be reconciled with the former.¹ In short, a will is not to be read so as to contradict itself, if its apparent contradictions can be reconciled by bringing the various clauses together, and deducing a consistent interpretation from the whole context.²

§ 475. **General Description, whether limited by Particulars.** — A similar rule is that, where the whole will indicates nothing to the contrary, a gift by words of general description is not to be limited by a subsequent attempt at a particular description.³ But this presumption is overcome by an expression of intent to the contrary, as gathered from the whole instrument.⁴

§ 476. **Regard paid to the Predominant Idea of the Will.** — In construing a will, the predominant idea of the testator's mind, if apparent, is heeded, as against all doubtful and conflicting provisions which might of themselves defeat it. The general intent and particular intent being inconsistent, the latter must be sacrificed to the former. If, for instance, the primary object of a son's will was to provide for his mother through the interposition of executors and trustees, the death of these latter will not cause that provision to fail.⁵ All such subordinate provisions bend in construction to the testator's main purpose and should, if possible, help carry it out, not obstruct it; and undue stress should not be laid upon particular expressions or detached clauses.⁶

§ 477. **Courts will change or mould Language so as to give Intention Effect.** — Indeed, courts have gone so far in aiding

¹ *Ward v. Amory*, 1 Curt. 419.

² *White v. Allen*, 81 Ind. 224; *Lucas v. Duffield*, 6 Gratt. 456; 10 La. Ann. 164.

³ *Martin v. Smith*, 124 Mass. 111; *Freeman v. Coit*, 96 N. Y. 63; next c.

⁴ *Urich's Appeal*, 86 Penn. St. 386; *Allen v. White*, 97 Mass. 504.

⁵ 3 Dem. 307.

⁶ *Stimson v. Vroman*, 99 N. Y. 74; *Hitchcock v. Hitchcock*, 35 Penn. St. 393; *Workman v. Cannon*, 5 Harr. 91; *Thrasher v. Ingram*, 32 Ala. 645; *Rose v. McHose*, 26 Mo. 590. Cf. *Pickering v. Langdon*, 22 Me. 413.

the intention of a testator as even to change or mould the language of a will in construction, so as to carry out what it appears from reading the whole will that the testator actually intended.¹ They have discarded words as surplusage which were senseless as they stood expressed in the instrument.² They have rejected or modified expressions in the will which were inconsistent with the main intention, or which indicated an intention which the law would not permit to take effect.³ They have transposed words so as to bring out the testator's obvious meaning.⁴ They have supplied words with the same object in view.⁵ They have dealt lightly with errors of syntax and punctuation.⁶ They have constantly read "and" as though it were "or," and *vice versa*,⁷ and in various other instances given words and expressions a meaning quite different from their literal acceptance. They have even gone so far as to change words which evidently were miswritten, so as to give a meaning precisely opposite to what the will expressed on its face; as in reading "dying without issue" as though it were "dying with issue."⁸

In all such instances, however, the avowed object of the interpreting court has been to dispel the effect of some careless, inaccurate, or ignorant use of language on the part of

¹ 1 Jarm. Wills, 499, 503; 2 Ib. 842; Cox v. Britt, 22 Ark. 567; Metcalf v. Framingham Parish, 128 Mass. 370.

² 2 Ves. 277; 1 Jarm. Wills, 479; 12 East, 515; 1 B. & Ald. 137; Wright v. Denn, 10 Wheat. 204.

³ See Mellor v. Daintree, 33 Ch. D. 198, 206.

⁴ 2 Ch. Ca. 10; Hob. 75; 2 Ves. 32; 1 B. & Ald. 137; Ferry's Appeal, 102 Penn. St. 207; Hornby, *Ex parte*, 2 Bradf. 420; Linstead v. Green, 2 Md. 82; Baker v. Pender, 5 Jones L. 351; Christie v. Phyfe, 19 N. Y. 344; O'Neill v. Boozer, 4 Rich. Eq. 22; 1 Jarm. Wills, 500.

⁵ Cleland v. Waters, 16 Ga. 496; Dew v. Barnes, 1 Jones Eq. 149; Aulick v. Wallace, 12 Bush. 531; Hellerman's Appeal, 115 Penn. St. 120; Mellor v. Daintree, 33 Ch. D. 198; 1 Jarm.

Wills, 486; 7 T. R. 437; 6 East, 486; 7 Gill and J. 227. In an early case the words "without issue" were supplied where one devised to A and his heirs, and if he died, then over. 1 And. 33.

⁶ 87 Penn. St. 51; 19 S. C. 297.

⁷ Doe v. Watson, 8 How. 263; 1 Jarm. Wills, 505, 517, and cases cited.

⁸ 8 Mod. 59; 2 D. M. & G. 300; 2 Jarm. Wills, 843. In various instances where the testator uses the phrase "without issue," the court has read "without leaving issue." 1 Jarm. Wills, 487; Amb. 112; 13 Ves. 476; 1 Harr. & G. 111. For other changes, see 1 Jarm. Wills, 503-524, and Bigelow's notes. "Between" may thus be read as though written "among." Hick's Estate, 134 Penn. St. 507. "Then" is construed favorably to intent in Perkins's Appeal, 108 Penn. St. 314.

the testator or his scrivener, and make the will interpret what he obviously meant, just as though his ideas had been clearly and correctly expressed in the instrument. But changes like these will not be made upon any mere conjecture, however reasonable, of what the testator meant, in opposition to the plain sense of the instrument as it stands.¹ All other things being equal, the natural and literal import of words and phrases is presumed to have been intended;² and each word is to have its effect, if the general intent be not thwarted thereby.³ No words of a will are to be rejected if any intelligent meaning can be given them.⁴

Nor will language be distorted or meddled with, whose meaning is clear, for the sake of correcting that which extrinsic proof might show to have been a mistake of fact on the testator's part; nor words supplied which it is not evident that the testator intended to use.⁵ To change or supply words for the sake of creating an intent or of making the will different from what the testator meant it to be is certainly inadmissible;⁶ but the moulding or altering must be in furtherance of the purpose expressed in the context.

§ 478. **Treatment of Repugnant Parts.** — But while varying and conflicting clauses should, if possible, be reconciled so as to make each clause operative, it has often been ruled that in case of invincible repugnancy, the latter clause ought to prevail over the former.⁷ This doctrine appears to be deduced

¹ 2 Jarm. Wills, 843; 18 Ves. 368; 2 Mer. 25; 1 Brev. 414; Simpson v. Smith, 1 Sneed, 394; Caldwell v. Willis, 57 Miss. 555.

² 2 Dem. (N.Y.) 534; 5 J. J. Marsh. 600; 2 La. Ann. 168.

³ 8 Port. (Ala.) 380.

⁴ Seibert v. Wise, 70 Penn. St. 147.

⁵ 6 Munf. 114; Liston v. Jenkins, 2 W. Va. 62.

⁶ 37 N. J. Eq. 5. As to legacies, see Schoul. Exrs. & Adms. §§ 458-475. It is a familiar rule that where the name of a legatee is erroneously stated in a will, and there is no reasonable doubt as to the person intended, this mistake

will not defeat the bequest, but the court will read the name as it ought to stand. Hill v. Downes, 125 Mass. 509; Caldwell v. Willis, 57 Miss. 555; Eastwood v. Lockwood, L. R. 3 Eq. 487.

⁷ 1 Jarm. Wills, 472; L. R. 6 C. P. 500; 6 Ves. 100; Crone v. Odell, 3 Dow, 61; Homer v. Shelton, 2 Met. 202; Thrasher v. Ingram, 32 Ala. 645; 31 Hun, 119; Pratt v. Rice, 7 Cush. 209; Smith v. Bell, 6 Pet. 84; 3 Whart. 162; Sherrat v. Bentley, 2 M. & K. 149; Orr v. Moses, 52 Me. 287; Evans v. Hudson, 6 Ind. 293; 74 Me. 413; Heidelberg v. Wagner, 72 Iowa, 601; Hendershot v. Shields, 42 N. J. Eq. 317.

from the principle, fair enough in the comparison of expressions of different date, that the testator's latest expression should be preferred to all previous ones; a principle, however, which must be somewhat strained when applied to the various consecutive parts of what has been obviously shaped out to stand as the one full and contemporaneous expression. Such a rule, therefore, as here applied, is properly a last resort, and when all efforts at reconciliation fail; for the intention of the testator is to be gathered from a consideration of the whole contemporaneous will and a comparison of the different terms, and effect given to this intention throughout if it can be fairly and legally done; and one's general or predominant intention, if discoverable, must prevail over a particular or subsidiary one.¹ The repugnancy which will justify the rejection of a word or clause from a will must arise upon the face of the will.² It is only when the context itself is a source of obscurity that courts, rather than be driven to suffer the will to fail, accord this favor to an expression locally posterior in the instrument, each expression being sufficiently intelligible when taken by itself, and sacrifice the prior clause accordingly.³ The effect, though usually to limit or qualify a former gift, may be to destroy it altogether.

If any word or expression has no intelligible meaning, or is absurd, or repugnant to the clear intent shown in the rest of the will, it may be rejected.⁴ Nor is a clear gift or devise in one part of the will to be cut down or out by indefinite, doubtful or ambiguous expressions in another part or upon any conjecture; but the intention to cut down or out, or the inconsistent provision, must be indicated with at least rea-

¹ 3 Ves. Jr. 103; *Constantine v. Constantine*, 6 Ves. 100; *Homer v. Shelton*, 2 Met. 202; *Covenhoven v. Shuler*, 2 Paige, 122; *Hunt v. Johnson*, 10 B. Mon. 342; 11 Gill & J. 185; *Robert v. West*, 15 Ga. 122; *Walker v. Walker*, 17 Ala. 396; *Pickering v. Langdon*, 22 Me. 430; *Van Vechten v. Keator*, 63 N. Y. 52; 65 Penn. St. 388; *Baxter v. Bowyer*, 19 Ohio St. 490; § 476.

² See 20 Ohio St. 490.

³ 1 Jarm. Wills, 472-485. This rule, though artificial, is of ancient standing. "Cum duo inter se pugnancia reperiuntur in testamento, ultimum ratum est." Co. Lit. 112 b.

⁴ 12 Mass. 537; 1 Jarm. Wills, 480; *Needham v. Ide*, 5 Pick. 510; 2 Desaus. 32; *Holmes v. Cradock*, 3 Ves. Jr. 521; *Davis v. Boggs*, 20 Ohio St. 550.

sonable certainty.¹ In various instances inconsistent gifts or devises have been reconciled in construction, by reading the later one as referring to a possible lapse of the former one or as dependent upon some contingency which is deducible from the instrument taken as a whole.² And after some dispute the English cases sustain the theory, that where two devises in fee are given of the same property, a sacrifice of the former may be avoided by considering that the devisees take concurrently;³ and that of a chattel not utterly indivisible, the legatees inconsistently mentioned shall each have a moiety.⁴ Where a will can be construed as consistent with itself, the disastrous effect of repugnancy is avoided.⁵ A clear gift or devise is not to be controlled by the reasons assigned for making it; nor by any inaccurate words of reference or recital which may subsequently occur in the will, nor by mere inference and argument in general.⁶

§ 479. **Favor to Heir or Next of Kin, considered.** — Against the fundamental maxim that the intention of the testator shall prevail comes in conflict another primary one, namely, that the heir-at-law shall not be disinherited by conjecture, but only by express words or necessary implication.⁷ This latter rule of presumption has been long asserted by the courts in England and America;⁸ but the policy of modern times extends such a presumption rather in favor of heirs

¹ 1 Jarm. Wills, 479; Price v. Cole, 83 Va. 343; Meyer v. Cahen, 111 N. Y. 270; Hochstedler v. Hochstedler, 108 Ind. 506; 119 Ind. 525; Ilsley v. Ilsley, 80 Me. 23; 79 Me. 177; Wilmoth v. Wilmoth, 34 W. Va. 426.

² 5 B. & Ald. 536; Ley v. Ley, 2 M. & Gr. 780. And see 5 Ex. 107.

³ Sherrat v. Bentley, 2 M. & K. 165.

⁴ Ib.

⁵ Stebbins v. Stebbins, 86 Mich. 474.

⁶ 1 Jarm. Wills, 483-485; 2 Ib. 841; Cole v. Wade, 16 Ves. 27; Cowp. 833; 8 Ves. 42; Terry v. Smith, 42 N. J. Eq. 504.

⁷ "That the application of the latter rule has had the effect of defeating the intention of a testator in ninety-nine

cases out of a hundred, has often been a subject of complaint." Grier, J., in Smith v. Shriver, 3 Wall. Jr. 219. The English courts have asserted this rule very strongly in times past. "There is hardly any case," says Lord Hardwicke, "where implication is of necessity; but it is called necessary because the court finds it so hard to answer the intention of the devisor." Coryton v. Helyar, 2 Cox, 340, 348. And see Jarman's rule V. *post*.

⁸ 2 Stra. 969; 5 T. R. 558; 18 Ves. 40; 1 Jarm. Wills, 532; 2 Ib. 841; Howard v. American &c. Society, 49 Me. 288; Bender v. Dietrick, 7 W. & S. 284; Wright v. Hicks, 12 Ga. 155.

and next of kin, generally, — that is to say, to any one or all, who would, independently of a will, have taken the property in question under the appropriate statutes of descent and distribution;¹ though doubtless originally the technical heir-at-law, he who after his ancestor's death intestate had a right to the lands of which such ancestor was seised, found himself the law's especial favorite. To such a maxim is due a variety of precedents which we shall note hereafter; and this artificial presumption chief of all, that any devise of lands to a person without words of limitation, even though to the testator's own spouse, confers an estate for life only.²

It may be safely laid down, that of two equally probable interpretations of a will, that shall be adopted which prefers the family and kindred of the testator to utter strangers.³ And where a testator give the whole or part of his estate to his next of kin, and leaves the proportions doubtful, it is natural to suppose that he meant the statutory form of distribution to prevail.⁴

§ 480. **The Same Subject: Favor to Children and Lineal Descendants, etc.** — Thus is it particularly as to one's own children or lineal descendants; and the nearer by blood to the testator is the heir or the next of kin in natural relationship, the less do courts incline to construe the will as though the maker were devoid of natural affection, not to add a sense of duty. Our modern legislation, as already shown, fortifies the general presumption that the name of any child omitted from the will was accidentally left out, and not purposely; and thus are the harsh consequences of disinheritance avoided if only a reasonable doubt remain of the testator's real intention. It is not to be readily assumed therefore that a will purposes disinheriting a son or a daughter.⁵ Posthumous offspring

¹ 1 Jarm. Wills, 339, 623; 2 Ib. 841;
4 Beav. 318. Jarman speaks of "the
heir or next of kin." See Rules V. &
VI. in foot note, *post*, § 492.

² King v. Ackerman, 2 Black, 408;
Wright v. Denn, 10 Wheat. 204. See
post, this presumption discussed in § 483,

³ Downing v. Bain, 24 Ga. 372;
Wood v. Mitcham, 92 N. Y. 375.

⁴ Dunlap's Appeal, 116 Penn. St. 500.

⁵ Weatherhead v. Baskerville, 11
How. 329; Blagge v. Miles, 1 Story,
426; *supra*, § 20.

receive indulgent consideration, wherever a will comes up for construction.¹ Indeed, under the Louisiana code a testator cannot dispose of more than one-fifth of his property to the exclusion of a child; but the child becomes the "forced heir," so to speak, of the residue.²

Infant children, most of all, deserve a court's solicitude; for those of tender years at least can hardly be thought to have incurred the parent's just resentment, or to deservedly forfeit what naturally belongs to them; and being themselves unable to protect their own inheritance, the tribunal of justice should secure those rights for them where the rules of interpretation permit it. Granting that the legal obligation of a father to support his young children is not continued upon his estate after his death, yet every true parent recognizes the moral obligation, and so natural is this feeling, that courts may well presume that the parent made his will under its influence.³

§ 481. **The Same Subject.**—But by children, lineal descendants or heirs and next of kin generally, in the present connection, we mean those who are legitimate. No such presumption arises in favor of a testator's illegitimate relatives; but, in the absence of clear intent on his part to the contrary, those who are legitimate shall take the preference.⁴ But among one's legitimate and legitimized offspring, American policy favors the presumption that no one shall be favored above the rest, but all shall share equally in the parent's bounty, unless, of course, the will in question shows a different intention. As concerns a testator's gifts, however, to other parties, their children, being no issue of his own, are not to be brought within the scope of his bounty by any mere implication of the will.⁵ And as among a testator's collateral relatives or strangers, favoring presumptions carry little or no weight against the testator's meaning.⁶

¹ Moffit v. Varden, 5 Cr. C. C. 658.

² Patterson v. Gaines, 6 How. 550.

³ See Vail v. Vail, 10 Barb. 69; Weatherhead v. Baskerville, 11 How. 329.

⁴ See Appel v. Byers, 98 Penn. St. 479. But by plain reference in the will,

legitimate and illegitimate children may be placed on an equal footing. Stewart v. Stewart, 31 N. J. Eq. 398.

⁵ See Rawlins' Trusts, 45 Ch. D. 299.

⁶ Jodrell Re, 44 Ch. D. 590; aff. App. Cas. (1891) 304.

§ 482. **The Same Subject: Deeper Principle favors what is Just and Natural.**—This strict rule in favor of the “heir-at-law” is of feudal origin; and modern instances are not wanting, in which eminent judges, and those particularly of our own country, show a disposition to repudiate it in favor of the simple test of intention under the particular will.¹ But the stability of land titles and the force of settled precedents in the jurisdiction where lands which are devised happen to lie must needs counteract and check such a disposition. It is undesirable, certainly, at this day, for an American court to distort and violate the provisions of a will, well ordered and well expressed, out of an undue sanctity for real estate and the ancient privilege of inheriting it; yet, as we apprehend, this maxim which has so long offset a testator’s real wishes, has a deeper and more lasting foundation in human experience. Our reference to children and the natural claims of kindred may confirm this impression. And the broader principle of law appears to be this: that whatever the policy of the age and jurisdiction for the time being may pronounce unwise or unjust, even though not really illegal, shall be presumed against, in the construction of a will, unless the plain intention of the testator appears to the contrary; a maxim which may serve for courts in the present and future as well as the past, and through all the shifting mutations of public authority or public opinion. It has been shown that testaments may stand in probate which are harsh, unkind, unnatural, partial, or foolish in their provisions, if not the product of a mind insane or under coercion,—in short, that one may do as he wills with his own, provided he does what is not unlawful;² but such wills are prejudiced in their admission, notwithstanding; and so, too, when interpreting a will, the presumption should be in favor of a disposition to do what was natural, fair, and reasonable, unless such a construction would defeat the testator’s plain intention in the given case. For we cannot deny that the intention of a testator, though harsh

¹ Taney, C. J., in *Bosley v. Bosley*,
14 How. 390, 397; *King v. Ackerman*,
² Black, 408.

² *Supra*, §§ 22, 77, 165.

and unreasonable, must guide, when clearly expressed, if it violates no principle of law or morality.¹

§ 483. **Devise without Words of Limitation; Heir less favored than formerly.** — With regard to a devise without words of limitation the heir-at-law is less favored in construction than formerly. The old rule stood that a devise of lands to A simply, conferred an estate for life only, unless an intention was disclosed in the will to the contrary; and the rule was the same where the devise to A was of "lands, tenements, and hereditaments." If, therefore, the words of the testator denoted only a description of the specific land or estate, — as if he devised a certain farm to A, or to A and his assigns, — only a life estate would pass.²

But this rule operated very unjustly; and the courts showed much astuteness to avoid an interpretation which in many instances must have subverted the testator's purpose. English precedents established that a devise of land to A "forever" might pass the fee;³ or a devise to A, his executors and administrators;⁴ or a devise of land to be at the disposition of A, or to be kept in his name and family.⁵

In this country, a devise after a life estate, especially if made to one heir, with an evident intention of excluding the other heirs, has in several instances been held to pass a fee.⁶ And one devise made simply has been supported as a devise in fee by coupling it with another in the will which was used with suitable words of limitation.⁷ Indeed, in many States it has been held that whenever an intention to dispose of the fee can by any fair inference be drawn from the will, the technical rule must be excluded; and that very slight cir-

¹ See *Brearley v. Brearley*, 9 N. J. Eq. 91.

² Co. Lit. 96; *Hogan v. Jackson*, Cowp. 306; *Hopewell v. Ackland*, 1 Salk. 239; *Wright v. Denn*, 10 Wheat. 238; *Van Alstyne v. Spraker*, 13 Wend. 582; *Lummas v. Mitchell*, 34 N. H. 45; *King v. Ackerman*, 2 Black, 408.

³ Co. Lit. 96.

⁴ *Rose v. Hill*, 3 Burr, 1881.

⁵ *Wood v. Wood*, 1 B. & Ald. 518.

And see *Oates v. Brydon*, 3 Burr, 1895; *Wyatt v. Sadler*, 1 Munf. 537; *Bool v. Mix*, 17 Wend. 127; *Clayton v. Clayton*, 3 Binn. 483.

⁶ *Plimpton v. Plimpton*, 12 Cush. 463; *Butler v. Little*, 3 Greenl. 241; 1 Grant Cas. 240. Cf. 1 Barb. 112.

⁷ *Cook v. Holmes*, 11 Mass. 532; *Neide v. Neide*, 4 Rawle, 82; 7 Ind. 282; *Charter v. Otis*, 41 Barb. 529.

cumstances will be laid hold of as indicating such an intention.¹ And the fact that real and personal estate are given together by the same clause and in the same language has been held of great moment if not conclusive as passing a fee.²

§ 484. — **The Same Subject; "Estate," etc.; Effect of a Charge, Gift over, or Trust.** — Lord Mansfield and others checked further this sacrifice of the intended devisee to the heir, by ruling that whenever the words of devise denoted the quantum of interest or property that the testator had in the lands devised, then the whole extent of such interest would pass to the devisee. And hence the established exception that the word "estate" or "estates" sufficiently passed the fee simple of land, although accompanied by words of locality or occupation; and this notwithstanding that "estate" is an equivocal word and might mean either the land itself or the testator's interest in it.³ A devise of "all my estate called C," etc., therefore, or other similar expression, even though applicable in a strict sense to corpus rather than interest, has thus been liberally applied in the devisee's favor,⁴ in spite of an occasional check where the word "estate" is not an operative word occurring in the gift itself, but introduced somewhat later in the will by way of reference.⁵ The word "effects" as used in a devise of "all my effects real and personal," or the word or expression "property," "lands," "my right," "all I have," and the like, have also been interpreted by way of exception as denoting the quantum of interest bestowed in the devise.⁶

So, too, has an indefinite devise been enlarged by the im-

¹ Hawkins Wills, 131, 'Swords' v. Paine, 3 Cranch, 97; Hawkins Wills, American note; Lummus v. Mitchell, 131-133.
² 34 N. H. 46; Cleveland v. Spilman, 25 Ind. 99.

³ Ib.; Packard v. Packard, 16 Pick. 193. Under the Iowa code an heir is disinherited whenever an ancestor's devise chooses to omit providing for him. 74 Iowa, 279.
⁴ Cf. Burton v. White, 1 Exch. 535; Leland v. Adams, 9 Gray, 171.
⁵ 22 L. J. Ch. 236; 4 Wash. C. C. 645; Nicholls v. Butcher, 18 Ves. 193; 3 Sim. 398; 6 Ohio St. 488; 9 Penn. St. 142; Chamberlain v. Owings, 30 Md. 453.

⁶ White v. Coram, 3 K. & J. 652; Child v. Wright, 7 East, 259; Lambert

position of a charge, however small, on the person of the devisee or on the quantum of his interest ; though not by the mere subjection of the devise to a charge.¹ A gift over in the event of the devisee dying under age has also been held to make the devise an effectual fee simple by intent ;² or a devise with power to dispose of the fee.³ And once more has the heir been excluded in construction, whenever the estate in fee is devised to trustees in trust for A, indefinitely, and the purposes of the trust require the whole legal fee to be in the trustees ; for here the beneficial interest in fee goes completely to A, and there is therefore no resulting trust for the heir.⁴

§ 485. **The Same Subject : Modern Statute Rule of Construction.** — This refined construction in favor of the heir, together with the refinements of exception built upon it, now gives way to the modern rule of interpretation as defined in the English Act of Victoria (1837) and corresponding enactments throughout the United States, many of them dating much earlier.⁵ This modern rule treats a devise of lands, though without words of limitation, as passing the fee simple to the devisee, unless an intention appear to the contrary.⁶ The natural scope of the will, as gathered from all its parts, thus settles in fine the question whether or not a devise in fee or such other complete interest as the testator had power to dispose of shall pass, or instead a mere usufruct and temporary enjoyment, leaving to the heir the ultimate benefits.

§ 486. **When a Will takes Effect ; After-acquired Property.** — A will does not take effect, nor are any rights acquired

¹ *Stevens v. Snelling*, 5 East, 87; *Burton v. Powers*, 3 K. & J. 170.

² *Burke v. Annis*, 11 Hare, 232; 3 Burr. 1618.

³ *Shaw v. Hussey*, 41 Me. 498; 1 Harr. 27; *Helmer v. Shoemaker*, 22 Wend. 139.

⁴ 8 T. R. 597; *Knight v. Selby*, 3 M. & G. 92; *Moore v. Cleghorn*, 12 Jur. 591; 31 L. J. C. P. 25; *Hawkins Wills*, 134-138.

⁵ In New Jersey, Virginia, and North Carolina, statutes of this description appear to have preceded the formation of the American Union in 1787-89; and a later enactment in South Carolina was held (4 McCord, 476) to merely affirm the common law in that State. *Hawkins Wills*, 139, note by Swords.

⁶ Stat. 1 Vict. c. 26, § 28; App. *post*.

under it, until the death of the testator ; although, doubtless, it may speak for some purposes from the date of execution, and for others from the death of the testator, according to the particular intent manifested in the instrument itself.¹

The old rule made a devise of land speak imperatively at the date of execution, but a will of personalty presumedly at the time of the testator's death. Hence, after-acquired lands did not pass by a devise, even though the testator meant that they should, but required re-execution or a new devise in effect, upon the theory that the devise was in the nature of a conveyance of one's particular real estate. Even a bequest of leaseholds spoke *prima facie* from the date of the will and did not include after-acquired leaseholds nor a renewed lease.² But our latest legislative policy, English and American, permits after-acquired lands to pass by will wherever the testator appears to have so intended.³ A will as to personalty is still presumed to speak or apply to one's personal estate as it shall exist at his death.⁴

Apart from statutory changes, the rule against passing after-acquired lands (which of course favored the heir-at-law) has generally prevailed throughout the United States ; while,

¹ 1 Jarm. Wills, 318-337; 2 ib. 840; Wakefield v. Phelps, 37 N. H. 295; Fox v. Phelps, 17 Wend. 393; Gold v. Judson, 21 Conn. 616; 5 Iowa, 196; Means v. Evans, 4 Desau. 242; 21 Tex. 713.

As to the effect of a subsequent statute upon one's will, see *supra*, § 11.

The general rule appears to be that the will shall speak rather from the date of the testator's death than from the date of execution, unless its language may fairly be construed to the contrary. Gold v. Judson, *supra*. But intention governs after all; and if the will uses the word "now," or a verb in the present tense, or other expression pointing at the present, it must be construed accordingly. 1 Jarm. Wills, 318, and Bigelow's note. It is even possible that the provision in a will should, by its express terms, refer to some expected

date or event happening between the date of execution and that of the testator's death, and require a corresponding interpretation. See 37 N. J. Eq. 482.

² *Supra*, § 29; Hawkins Wills, 14-18; James v. Dean, 11 Ves. 383; Holt, 248; Girard v. City, 4 Rawle, 333; Haven v. Foster, 14 Pick. 537; 2 Story, 327.

³ *Supra*, § 29; Girard v. Philadelphia, 2 Wall. Jr. 301; Smith v. Edrington, 8 Cr. 66; 18 S. C. 94; Lorillard *Re*, 16 R. I. 254.

⁴ Garrett v. Garrett, 2 Strobb. Eq. 272; Canfield v. Bostwick, 21 Conn. 553; Nichols v. Allen, 87 Tenn. 131.

Even where the testator's estate was largely increased after making the will by an inheritance of which he was not aware at his death, all the property will pass as the will provides. Dalrymple v. Gamble, 68 Md. 523.

as in England, a bequest of "all my personal estate" or "the residue of my personal estate" meant the personal estate existing at the death of the testator.¹ But in almost all of our States, as also under the 24th section of Stat. 1 Vict. c. 26, in England, statutes are now to be found abolishing or modifying the rule of the common law with respect to the time from which devises of freeholds speak.² In applying such enactments to particular wills, however, one must carefully consider the time and manner in which the local statute is declared to apply; whether to all wills taking effect after the enactment or only to such as are made subsequently. And two distinct particulars are embraced under such legislation: (1) that after-acquired real estate shall pass by a devise when such appears to have been the testator's meaning; (2) or that power is simply given to dispose of after-acquired real estate.³ The preferable rule as to after-acquired property stands thus, with the aid of legislation: that descriptions whether of real or personal estate, the subject of gift, refer to and comprise *prima facie* the property answering to that description at the death of the testator;⁴ but that at all events the intention manifested by the will shall prevail.⁵ The presumption against one's intending a partial intestacy may come in aid of such a rule of construction.⁶

§ 487. **Codicil construed with the Will.** — A codicil is a part of a will, but with the peculiar function annexed of expressing the testator's afterthought or amended intention.⁷ The codicil should be construed with the will itself; and from its very nature it may, as a context, confirm, alter, or alto-

¹ Ib.

² *Supra*, § 29; Hawkins Wills, 18, and Swords' American note.

³ Ib. The English statute goes farther, and declares that the intent to speak from the testator's death shall be presumed, unless a contrary intention shall appear by the will. 1 Vict. c. 26, § 24; Appx. *post*.

⁴ An express declaration of an intention to dispose of after-acquired property is not necessary; it is enough if it

can be inferred from the terms of the will. *Brimmer v. Sohler*, 1 Cush. 133; *Wynne v. Wynne*, 2 Swan, 407; 33 Fed. 812; 69 Iowa, 617; *Patty v. Goolsby*, 51 Ark. 61; *Welborn v. Townsend*, 31 S. C. 408; *Haley v. Gatewood*, 74 Tex. 281.

⁵ *Dunlap v. Dunlap*, 74 Me. 402. As to effect of codicil in carrying after-acquired land, see *post*, § 487.

⁶ § 490, *post*.

⁷ *Supra*, §§ 7, 449; *post*, § 490.

gether revoke an intention expressed in the body of the instrument to which it is annexed.¹ A will and codicil are to be construed as one instrument, and are to be reconciled if possible;² but if plainly inconsistent, and the more so if the later instrument expressly revokes whatever is inconsistent with it, the codicil must prevail;³ for a later repugnant disposition as against an earlier stands on a footing of presumption far stronger than the later clause in one and the same contemporaneous instrument.

Yet even here a codicil should be so construed as only to interfere with the dispositions made in the will to the extent needful for giving full effect to the codicil.⁴ And it is held that the determination expressed by a codicil to alter the will in a specified particular, negatives by implication any intention to alter it in other respects.⁵

While the old rule was in force which denied that a will could convey lands acquired after its execution, the codicil might prove very serviceable in construction with it, because of a codicil's republishing force.⁶ Both will and codicil being taken as one entire instrument, a codicil which was so executed as of itself to be capable to pass lands, amounted *prima facie* to a republication of the will and brought it down to its own date; consequently the will spoke from the date of the codicil and included all lands acquired in the meantime.⁷ The codicil had this effect on the construction of the will, even though purporting to relate only to personal property and confirming nothing in express terms.⁸ But where the codicil

¹ *Brimmer v. Sohler*, 1 Cush. 118; *Lee v. Pindle*, 12 Gill & J. 288; *Armstrong v. Armstrong*, 14 B. Mon. 333; *Hitchcock v. U. S. Bank*, 7 Ala. 386.

² *Ib.*; *Thompson v. Churchill*, 60 Vt. 371; *Ward v. Ward*, 105 N. Y. 68.

³ *Pickering v. Langdon*, 22 Me. 413; 3 Md. Ch. 42; *Lee v. Pindle*, 12 Gill & J. 288; 138 Penn. St. 104.

⁴ *Ives v. Harris*, 7 R. I. 413; 5 Sandf. 467; 2 Jones Eq. 13; *Jenkins v. Maxwell*, 7 Jones L. 612.

⁵ *Quincy v. Rogers*, 9 Cush. 291.

If it is clear that a trust to which the

codicil refers is not the trust created by the will, but a separate or independent one, the language of the codicil alone must be resorted to in construction of such trust. *Thompson v. Thompson*, 140 Mass. 28.

⁶ *Supra*, §§ 7, 449.

⁷ *Jones v. Shewmaker*, 35 Ga. 151; *Beall v. Cunningham*, 3 B. Mon. 390; *Acherly v. Vernon*, Com. 381; 2 M. & S. 15.

⁸ *Piggott v. Waller*, 7 Ves. 98; 4 K. & J. 73. *Cf. Doe v. Walker*, 12 M. & W. 591; *Haven v. Foster*, 14 Pick. 541.

showed a plain intention to deal only with the identical property embraced in the will, this presumption was overcome.¹

§ 488. **Some Effect should be given to a Will.** — Some effect should, at all events, if possible, be given to a will, however obscure and informal its language; and it is only where a reasonable construction and the discovery of the intent of the testator are hopeless, that all effect should be denied to the instrument.² And hence where a will admits of two constructions, one of which renders it operative and the other inoperative, the former is to be preferred.³

§ 488 *a*. **Effect of Will, whether controlled by Change of Condition of Estate.** — If the language and terms of a will are not doubtful, the fact that the testator intended to accomplish some special purpose thereby cannot control its effect in construction. Thus, where a design is disclosed by reasons stated in the will, to give more to certain poor beneficiaries than to certain rich ones, under the chosen plan of division, and this design happens to be defeated, because of changes in the condition of the estate after the will was made, or from other causes, the plan which the testator plainly prescribed must nevertheless be followed out, even though it should fail to effectuate his purpose.⁴

Nevertheless, where a change in the condition of the property occurs after the execution of the will, — as by converting the residue from real to personal estate, — a court of equity inclines, as between two constructions of the will, to favor that by which the testator's obvious wishes may be carried into effect.⁵ And where from the change of circumstances it becomes obviously impossible to execute the will as intended, some substantial approximation to the testator's scheme is sometimes attempted.⁶

¹ *Bowes v. Bowes*, 2 B. & P. 500; *Monypenny v. Bristow*, 2 Russ. & My. 132. subject of uncertainty in wills is considered at more length in ch. 3, *post*.

² *Den v. Crawford*, 8 N. J. L. 90; *Wootton v. Redd*, 12 Gratt. 196. ⁴ *Terry v. Smith*, 42 N. J. Eq. 504; *supra*, § 478.

³ 1 *Jarm. Wills*, 356; 2 *ib.* 842; 3 *Bills v. Putnam*, 64 N. H. 554.

Burr. 1626; *L. R.* 5 H. L. 548. The ⁶ *Wikle v. Woolley*, 81 Ga. 106.

§ 489. **Presumption of Compliance with Law ; Legal and Illegal Provisions, etc.** — Where, again, a will is capable of two constructions, one consistent and one inconsistent with the law, it may be presumed that the testator intended compliance with the law ; and upon this principle provisions under a will have frequently been upheld which, if otherwise construed, must have failed.¹ So, too, if one construction would give effect to the whole instrument while the other would destroy a part, it is the former construction which should prevail.² To all lawful dispositions of a testator the courts will give effect in construction.³

The maxim that every one is presumed to know the law, applies to existing but not to future enactments, in construing a testator's will.⁴

We may add that where legal and illegal bequests or trusts are found together, the disposition is to uphold those which are legal, provided they may stand independently and apart ; though it would be otherwise if the legal and illegal bequests or trusts were so inseparably connected as to constitute an entire scheme, for here they must fall together for illegality.⁵

§ 490. **Presumption against Partial Intestacy.** — No presumption of an intention to die intestate as to any part of his property is allowable when the words of a testator's will may fairly carry the whole ; for no one is supposed to make his will without meaning to dispose of all his estate. It is true, notwithstanding, that such a partial testament may be intended and may take effect.⁶ If a general intention appear in the will to make therein a complete general disposition of

¹ *Thompson v. Newlin*, 8 Ired. Eq. 32.

² *Pruden v. Pruden*, 14 Ohio St. 251.

³ *Lowry v. Muldrow*, 8 Rich. Eq. 241 ; *Thrasher v. Ingram*, 32 Ala. 645.

⁴ *Taylor v. Mitchell*, 57 Penn. St. 209.

⁵ *Kennedy v. Hoy*, 105 N. Y. 134.

⁶ *Given v. Hilton*, 5 Otto, 591 ; *Leigh v. Savidge*, 14 N. J. Eq. 124 ; *Gilpin v. Williams*, 17 Ohio St. 396 ; *Boyd v. Latham*, Busb. L. 365 ; *Gourley v. Thompson*, 2 Sneed, 387 ; *Raudenbach's Appeal*, 87 Penn. St. 51 ; 102 Penn. St. 207 ; *Damon v. Bibber*, 135 Mass. 458 ; §§ 7, 449.

all the testator's property, this cannot, it is true, control particular directions plainly to the contrary nor enlarge dispositions beyond their legitimate meaning; and yet this general intent is allowed weight in determining what was intended by particular devises or bequests that may admit of an enlarged or limited construction.¹

§ 491. **By what Local Law Wills are interpreted.** — Real and personal property are to be distinguished in the interpretation of a will. As to real property, the well settled rule of England and the United States is that, no matter where the will was made or in what language written, the law where the land lies must govern in the construction of the will as well as in its method of execution.² Thus, if a posthumous child not provided for by the testator has rights of inheritance in the State or country where the decedent leaves real estate, those rights will fasten upon such real estate.³ And in the interpretation of language which has a peculiar meaning in the local jurisdiction where the land lies, that meaning must prevail in the devise.⁴ The principle of local situation goes still deeper, making the validity of the devise itself as regards the local land depend upon its conformity to the requirements of local law.⁵

A will of personalty (or of movables, rather) is, on the other hand, governed in construction by the law of the testator's last domicile; and here again the principle is a broad one, embracing questions of validity as well as interpretation. Whether one shall take under the will as legatee, or aside from it by right of distribution, whether the decedent was himself capable and left a properly executed will, these and all kindred questions depend, like the general settlement of

¹ Given *v.* Hilton, 5 Otto, 591; Bishop *v.* McClelland, 44 N. J. Eq. 450; Boston Co. *v.* Coffin, 152 Mass. 95.

² 1 Jarm. Wills, 1, 2, and Bigelow's American note; 2 ib. 840; Story, Conf. Laws, § 474; 4 Burge Comm. Col. & For. Law, pt. 2, c. 15; Kerr *v.* Moon,

9 Wheat. 565; Pre. Ch. 577; Bull's Will, 111 N. Y. 624.

³ Eyre *v.* Storer, 37 N. H. 114.

⁴ Story, Conf. Laws, § 479; 1 Jarm. Wills, 2, and Bigelow's note.

⁵ See Schoul. Exrs. & Admsrs. §§ 15-20.

the estates of the dead, upon the law of the decedent's last domicile.¹ But the law where the will was made is allowed some force.

Where, then, one's will purports to dispose of property within and realty without the domicile, it may happen that the former disposition holds valid, but not the latter. But a clause which grants both real and personal property upon the same trust is generally severable, and may take effect as a disposition of personalty within the jurisdiction, even though the devise of realty elsewhere located should fail.²

§ 492. **Summary: Mr. Jarman's Rules of Construction.** — Rules of presumption, such as we have set forth in this chapter, yield to the exigencies of a case in hand; and as for the maxims yet to be applied in detail, no summary is worth attempting. But Mr. Jarman's general rules, framed upon an exhaustive review of the English cases, have gained such credit in the courts, that we shall set them forth in our notes for the convenience of the American reader by way of comparison; though in a few instances their practical application may in this country appear doubtful, and they anticipate certain matters whose discussion we shall defer to our third chapter.³

¹ 1 Jarm. Wills, 2, and Bigelow's Am. note; Story, Confl. Laws, § 465; Anstruther v. Chalmers, 2 Sim. 1; 25 Beav. 218; Schoul. Exrs. & Admsrs. §§ 15-20.

² *Ib.*; Knox v. Jones, 47 N. Y. 389.

³ Mr. Jarman's twenty-four rules are stated as follows in the 4th English edition of this most valuable treatise, Vol. II. pp. 840-843:

I. That a will of real estate, where-soever made, and in whatever language written, is construed according to the law of England, in which the property is situate, but a will of personalty is governed by the *lex domicilii*. II. That technical words are not necessary to

give effect to any species of disposition in a will. III. That the construction of a will is the same at law and in equity, the jurisdiction of each being governed by the nature of the subject; though the consequences may differ, as in the instance of a contingent remainder, which is destructible in the one case, and not in the other. IV. That a will speaks, for some purposes, from the period of execution, and for others from the death of the testator; but never operates until the latter period. V. That the heir is not to be disinherited without an express devise, or necessary implication; such implication importing, not natural necessity, but so strong

a probability, that an intention to the contrary cannot be supposed. VI. That merely negative words are not sufficient to exclude the title of the heir or next of kin. There must be an actual gift to some other definite object. VII. That all the parts of a will are to be construed in relation to each other, and so as, if possible, to form one consistent whole; but, where several parts are absolutely irreconcilable, the latter must prevail. VIII. That extrinsic evidence is not admissible to alter, detract from, or add to, the terms of a will (though it may be used to rebut a resulting trust attaching to a legal title created by it, or to remove a latent ambiguity [arising from words equally descriptive of two or more subjects or objects of gift]). IX. Nor to vary the meaning of words; and, therefore, in order to attach a strained and extraordinary sense to a particular word, an instrument executed by the testator, in which the same word occurs in that sense, is not admissible. X. But the court will look at the circumstances under which the deviser makes his will, as the state of his property, of his family, and the like. XI. That, in general, implication is admissible only in the absence of, and not to control, an express disposition. XII. That an express and positive devise cannot be controlled by the reason assigned, or by subsequent ambiguous words, or by inference and argument from other parts of the will; and, accordingly, such a devise is not affected by a subsequent inaccurate recital of, or reference to, its contents; though recourse may be had to such reference to assist the construction, in case of ambiguity or doubt. XIII. That the inconvenience or absurdity of a devise is no ground for varying the construction, where the terms of it are unambiguous; nor is the fact that the testator did not foresee all the consequences of his disposition, a reason for varying it; but, where the intention is obscured by conflicting expressions, it is to be sought rather in a

rational and consistent, than an irrational and inconsistent purpose. XIV. That the rules of construction cannot be strained to bring a devise within the rules of law; but it seems that, where the will admits of two constructions, that is to be preferred which will render it valid; and therefore the court, in one instance, adhered to the literal language of the testator, though it was highly probable that he had written a word by mistake for one which would have rendered the devise void. XV. That favor or disfavor to the object ought not to influence the construction. XVI. That words, in general, are to be taken in their ordinary and grammatical sense, unless a clear intention to use them in another can be collected, and that other can be ascertained; and they are, in all cases, to receive a construction which will give to every expression some effect, rather than one that will render any of the expressions inoperative; and of two modes of construction, that is to be preferred which will prevent a total intestacy. XVII. That, where a testator uses technical words, he is presumed to employ them in their legal sense, unless the context clearly indicates the contrary. XVIII. That words, occurring more than once in a will, shall be presumed to be used always in the same sense, unless a contrary intention appear by the context, or unless the words be applied to a different subject. And, on the same principle, where a testator uses an additional word or phrase, he must be presumed to have an additional meaning. XIX. That words and limitations may be transposed, supplied, or rejected, where warranted by the immediate context, or the general scheme of the will; but not merely on a conjectural hypothesis of the testator's intention, however reasonable, in opposition to the plain and obvious sense of the language of the instrument. XX. That words which it is obvious are mis-written (as dying *with* issue, for dying *without* issue) may be corrected. XXI. That the construc-

tion is not to be varied by events subsequent to the execution; but the courts, in determining the meaning of particular expressions, will look to possible circumstances, in which they *might* have been called upon to affix a signification to them. XXII. That several independent devises, not grammatically connected, or united by the expression of a common purpose, must be construed separately, and without relation to each other; although it may be conjectured, from similarity of relationship, or other such circumstances, that the testator

had the same intention in regard to both. There must be an apparent design to connect them. XXIII. That where a testator's intention cannot operate to its full extent, it shall take effect as far as possible. XXIV. That a testator is rather to be presumed to calculate on the dispositions in his will taking effect, than the contrary; and accordingly, a provision for the death of devisees will not be considered as intended to provide exclusively for lapse, if it admits of any other construction.

CHAPTER II.

DETAILS OF TESTAMENTARY CONSTRUCTION.

§ 493. **Details to be considered; as to the Property described in the Will.**—In this chapter we proceed to apply the general principles of testamentary construction to wills in their manifold details. And first of all let us consider the property described in a will and included under its provisions. Such descriptions may relate to real estate or to personal estate, or to one's property generally.

§ 494. **Descriptions relating to Real Estate: Leaseholds.**—A devise of one's "real estate" relates, strictly speaking, to freeholds so as to exclude the idea of chattels real and leaseholds. And the old rule of construction gave the same exclusive effect where the term "land" or "lands and tenements" or "lands, tenements and hereditaments" was employed in a will. Any such description was held *prima facie* to mean freeholds only, and leaseholds were excluded.¹ This rule equally applied whether the devise was of all one's lands, etc., or of lands under a limited description; as of "all my lands in the town of B."²

But this presumption of interest was overcome, where at the time of the devise the testator had no freehold lands answering to the description, but leaseholds or chattels real only.³ And where leasehold property was blended in situation and enjoyment with freeholds, or an intention to carry leaseholds was otherwise inferable from the context, the construction yielded accordingly;⁴ and leaseholds might thus pass even under a devise of "real estate."⁵

By the Statute 1 Vict. c. 26 the presumption is reversed,

¹ Cro. Car. 293; *Swift v. Swift*, 1 De G. F. & J. 160; *Thompson v. Lawley*, 1 De G. F. & J. 160; *Thompson v. Lawley*, 1 De G. F. & J. 160.

² B. & P. 303.

³ *Ib.*; *Hawkins Wills*, 30-32.

⁴ Cro. Car. 293; *Thompson v. Lawley*, *supra*.

⁵ *Hobson v. Blackburn*, 1 M. & K. 571.

⁶ *Swift v. Swift*, 1 De G. F. & J. 160.

so that in modern England, a devise of one's lands, or his lands in a specified place, shall include leaseholds *prima facie* as well as freeholds.¹ Corresponding enactments may be found in some parts of the United States ;² but neither legislature nor court has given the subject much attention in this country.³

§ 495. **The Same Subject: Trust Estates and Mortgages.** — It is to be presumed that a general devise of one's lands or real estate was intended to embrace land which the testator held as trustee or mortgagee ;⁴ and in such case the persons who suffer injury thereby must obtain satisfaction out of the decedent's estate.⁵

But if the will disclosed a purpose inconsistent with applying to such devise property of which the testator was not beneficial owner, this presumption does not hold good.⁶ As where the property is devised to trustees to sell, or with a charge of some sort imposed upon it ; or where the devise is encumbered with limitations.⁷ And though a general devise should pass whatever legal estate under a mortgage the testator had to transmit, it would not include the beneficial enjoyment of the money secured by the mortgage, since that is personal estate.⁸

¹ Stat. 1 Vict. c. 26, § 26 (1837). See Appx.; 28 Ch. D. 66; Knight *Re*, 34 Ch. D. 518.

² Hawkins Wills, 32, Swords' note.

³ The express reservations of a devise in such particulars must be respected. Chase *v.* Stockett, 72 Md. 235.

⁴ Braybroke *v.* Inskip, 8 Ves. 435; Jackson *v.* Delancy, 13 Johns. 554; Wills *v.* Cooper, 1 Dutch. 161; Heath *v.* Knapp, 4 Penn. St. 228; 4 Kent Com. 538, 539.

⁵ 1 Jarm. 698.

⁶ Martin *v.* Laverton, L. R. 9 Eq. 570; Hawkins Wills, 35; 1 Jarm. Wills, 689 *et seq.*; Brown *Re*, 3 Ch. D. 156. See Gibbes *v.* Holmes, 10 Rich. Eq. 484; 3 Desau. 346.

⁷ Hawkins Wills, 35-37; Morley *Re*, 10 Hare, 293; Rackham *v.* Siddall,

16 Sim. 297; 8 Ves. 436; 1 Jarm. 697, 698; Packman *Re*, 1 Ch. D. 214. Where such a devise would be in dereliction of the testator's duty, no such presumption will avail. Wills *v.* Cooper, 1 Dutch. 161; 2 Edw. Ch. 547.

⁸ Woodhouse *v.* Meredith, 1 Mer. 450. A gift of all the testator's right, title, and interest in land held by him as mortgagee is a gift of personalty only, and passes no title in the land. Martin *v.* Smith, 124 Mass. 111. Here the mortgagor was executor of the will of the mortgagee, and charged himself with the amount of the mortgage debt as assets in his hands, thereby operating a payment of the debt and a discharge of the mortgage.

"All my real estate" in a certain town, under the modern rule of after-

§ 496. **The Same Subject: Reversionary Interests.**—Under a general devise of one's land or real estate, all reversionary interests will pass unless a clear intention to exclude the same be shown.¹

§ 497. **The Same Subject: Lands contracted for.**—Lands which the testator has contracted to purchase pass *prima facie* under a general devise, though not actually conveyed to him.² As for lands which the testator has contracted to sell, the legal title thereto is presumed to vest in his devisee, as though by way of transferring what the testator held in trust; but not in general so as to give such devisee the beneficial enjoyment of the purchase-money.³

§ 498. **The Same Subject: "Land"; "Tenement"; "Hereditament."**—The word "land" is a term which comprehends any ground, soil, or earth whatever; and having an indefinite extent, upward as well as downward, it naturally includes all houses or buildings standing or built on it, besides mines, wells, and whatever else the soil may hold between its surface and the earth's centre.⁴ This word "land" receives generally its broadest sense where a will is interpreted; and yet not independently of the testator's apparent intent. Thus a devise of land covers usually the house standing upon it; but not where the context shows that the house itself or that part of the land on which the house stands was devised differently.⁵

acquired property (§ 486), will pass a piece of land there acquired afterwards by the testator in foreclosing a mortgage which he acquired subsequently. *Dickerson's Appeal*, 55 Conn. 223.

¹ *Tennent v. Tennent*, 1 Jo. & Lat. 389; *Church v. Mundy*, 15 Ves. 396; *Hayden v. Stoughton*, 5 Pick. 538; *Brown v. Boyd*, 9 W. & S. 128.

If one devises "lands not hereinbefore disposed of," or "lands not settled," etc., the consequence is similar. *Hawkins Wills*, 34, citing *Jones v. Skinner*, 5 L. J. Ch. N. S. 87; 3 P. Wms. 56.

² *Acherley v. Vernon*, 10 Mod. 518; *Collison v. Girling*, 4 My. & Cr. 75.

³ See *Hawkins Wills*, 38, 39; *Drant v. Vause*, 1 Y. & C. C. C. 580; 1 J. & W. 479. A testator who has the legal title to lands which he has sold by a written contract, can transfer by his will both the title and the notes given for the purchase-money; and the devisee will stand towards the purchaser just as the testator did during his life. *Atwood v. Weems*, 99 U. S. 183.

⁴ Co. Lit. 4a; 3 Kent Com. 378; 1 Jarm. Wills, 777.

⁵ *Heydon's Will*, 2 And. 123; Cro. El. 476, 658.

And again, one might devise lands with express reservation as to mines or a well contained therein.

"Land" is not so broad a term as "tenements," and "hereditaments"; for these include every species of realty, corporeal or incorporeal, that may be holden or inherited.¹ Hence, advowsons, tithes, etc., which pass under these broader terms, might not where merely land is devised;² yet, here again, a testator's intention controls;³ and in some American States, moreover, "land" has been defined as including tenements and hereditaments.⁴

§ 499. **The Same Subject: "Message"; "Premises."** — "Message" is a term somewhat antiquated, which seems however to mean nearly the same as dwelling-house;⁵ and opinions have sometimes differed as to whether a garden comes properly under this word, as well as the curtilage or enclosed space immediately around the dwelling, which is a more essential incident.⁶

The word "premises," which literally denotes that which is already stated, should depend for its breadth upon the expression to which it refers.⁷ But long association has given the word an independent sense synonymous with land or house; and this sense is respected by courts of construction.⁸

§ 500. **The Same Subject: "House," "Mill," etc.** — The grant or devise of a house will carry the land on which the house is built; and "house," like "message," thus imports

¹ Bouv. Dict. "Tenements," "Hereditaments"; 3 Kent Com. 401.

² 1 Jarm. Wills, 777; 11 H. L. Cas. 375.

³ *Ib.*; Styles, 261; 2 Leon, 41.

⁴ 1 Washb. Real Prop. 9. For the force of the context in determining the meaning, where leases are concerned, see *supra*, § 494. As to passing copyholds, see 31 Ch. D. 314.

As to the interest given under the will neither "tenement," nor the broader expression "hereditament," has any peculiar force, independently of other circumstances, to pass a fee. See Wright v. Denn, 10 Wheat. 204, 238.

⁵ Bouv. Dict. "Message." The word is said to include a church. *Ib.*; 11 Co. 26; 8 B. & C. 25.

⁶ In modern times the disposition is to regard the garden, and the orchard too, as part and parcel either of a "house" or a "message." Cro. El. 89; 2 Saund. 400; 1 Jarm. Wills, 778. But land beyond a homestead or orchard is not usually carried by either word. *Ib.* And see next section.

⁷ Bouv. Dict. "Premises"; 1 Jarm. 778; Biddulph v. Meakin, 1 East, 456.

⁸ *Ib.*; Heming v. Willets, 7 C. B. 709.

all the land within the curtilage, without any mention of "appurtenances."¹ "Dwelling-house," as a place for one's abode, is a more specific term; and as for "cottage," modern usage assigns the sense of a small dwelling-house, with more or less land annexed, though Lord Coke defined it for his times as a little house with no land at all;² while "mansion house" or "palace," as something more pretentious than either of these, conveys the idea of pleasure grounds annexed and a fine approach to the edifice.³

But whatever word of this description may be employed, a devise of the house will be presumed to carry that which is accessory and needful for its beneficial use and enjoyment, and no more; admitting, though we must, that a devise deserves a more flexible interpretation than a grant. House is synonymous, or nearly so, with messuage; and stables, and yard, garden, and orchard, are *prima facie* included, so as to enable the devisee to conveniently enjoy the grounds and keep up the style of living at the homestead as before.⁴ But the devise of a house does not include all that the occupier may find it convenient to occupy with it; nor are adjacent lands or lots, with buildings on them which tenants occupied when the will was made, *prima facie* included under such a devise, for the sake of the rents and profits.⁵ Erections, too, for business and trade are distinguished from those for domestic purposes in such a connection. Nevertheless each will stands by its own intent as manifested by its whole tenor; and while words of reservation or some other gift may curtail the devise in one case, an obvious desire to confer as beneficial an enjoyment as possible and to leave no part of one's estate undisposed of, may in another extend the devise beyond its more literal import; and a comparison of language in other parts of the will may aid in either case to resolve the doubt.⁶

¹ 1 Jarm. Wills, 779-781; Rogers v. 780; Clements v. Collins, 2 T. R. 468. Smith, 4 Penn. St. 93; Whitney v. Olney, See 146 Mass. 373.
3 Mason, 280.

² Co. Lit. 56 b. See 2 B. & Ad. 638.

³ Lombe v. Stoughton, 18 L. J. Ch. 400.

⁴ L. R. 1 Ch. 275; 1 Jarm. Wills,

⁵ Steele v. Midland R. L. R., 1 Ch. 275; Brown v. Saltonstall, 3 Met. 423. Cf. Blackburn v. Edgley, 1 P. Wms. 600.

⁶ Under the devise of a "barn," land

Again, if one should devise a certain "mill," "factory," "store," "warehouse," or other building for business purposes, not only would the building itself pass by force of the descriptive word, but such land under and adjoining it, besides, and such privileges as its beneficial use and enjoyment rendered necessary.¹

§ 501. **The Same Subject: "Appurtenances" and Similar Expressions.**—To make the description still more complete, a devise speaks sometimes of a house (or mill, etc.) "with its appurtenances," with all the lands "appertaining thereto" or "thereunto belonging," or "thereto adjoining," or some similar expression. Such terms seem to intimate that the testator meant that a generous effect should be given to his devise; but to speak strictly, land cannot be appurtenant to a house or other land;² and "appurtenances," though certainly tending to give the devisee whatever a commodious and beneficial enjoyment of the premises may require, cannot safely be said to give more than though the expression itself had been omitted.³ For appurtenances are things which pass as incident to the principal thing; and if the house be conveyed or devised, whatever is incident goes naturally with it.⁴

But courts have distinguished between a house "and its appurtenances," and a house "with the lands appertaining thereto," inasmuch as the latter expression implies at least that some lands are intended;⁵ and so with the less technical

enough passes to complete its enjoyment, and no more. *Bennet v. Bittle*, 4 Rawle, 339. As to "homestead" (aside from its more technical meaning under our local statutes), see 14 Iowa, 73. And for the devise of "house and lot," see 37 N. J. Eq. 482.

¹ *Whitney v. Olney*, 3 Mason, 280; 4 Edw. Ch. 545; *Blaine v. Chamber*, 1 S. & R. 169. As to a riparian owner's devise of "all my water privileges," together with his mills and factories, see *Nye v. Hoyle*, 120 N. Y. 195.

² Co. Lit. 121 b; 6 Bing. 161.

³ 1 Jarm. Wills, 781, 782. Grounds of doubtful incident to the house may thus be carried. Cro. El. 113. But not

adjacent lands which the testator had treated as a separate tract. 1 B. & P. 53; 16 M. & W. 494, *per* Parke, B.; *Smith v. Ridgway*, L. R. 1 Ex. 46.

⁴ See Bouv. Dict. "Appurtenances"; *Story*, J., in *Whitney v. Olney*, 3 Mason, 280. But land may pass under the term "appurtenances" in a will, to give effect to the intention. *Otis v. Smith*, 9 Pick. 293. See 12 Pick. 436. As to the bequest of a shot-tower, etc., "with all the appurtenances," in carrying a quantity of unmanufactured materials in the building, see *Sparks's Appeal*, 89 Penn. St. 148.

⁵ *Plowd.* 170 a; *Cro. Car.* 57; 1 Jarm. 782.

term, "thereunto belonging."¹ The phrase "thereunto adjoining" seems to suggest the idea of carrying a contiguous tract or tracts of land, and thus in fact have courts construed its meaning.²

§ 502. **Devise of a "Farm," "Freehold," etc.** — "Farm" in English law, meant originally the rent reserved on a lease, but extended in sense to the leasehold interest, or even the land itself, which was let to farm or rent. Farmers did not own the land they cultivated, but leased it from the landlord in large tracts, paying a yearly rent. Hence in modern times the word "farmer" means commonly an agriculturist or tiller of the soil, while a farm is the tract used for agricultural purposes, such as raising stock, fruit, grain, and vegetables. In England farms are more commonly rented to this day; but in the United States most farmers are their own landlords; and "farm" has come to mean in both countries a tract devoted to agriculture, whether owned by the cultivator or not.³

The devise of a farm in modern times will pass a message, arable land, meadow, pasture, wood, etc., together with the farmhouse and outbuildings; and the word "farm" may pass a freehold, if such appears to be the testator's intent.⁴ A devise of a "farm" may even include outlying tracts which were commonly known as a part of it.⁵

§ 503. **Devise of "Rents and Profits"; "Use and Occupation," etc.** — A devise of the "rents and profits" of land has from the days of Coke been considered as passing *prima facie* the land itself, since by the old feudal rule the whole beneficial interest of land consisted in taking rents and profits.⁶ And the same holds true where the "income" of lands is devised.⁷

¹ 1 Bing. 483; 2 B. & Ad. 680; 1 Jarm. 783.

² Josh v. Josh, 5 C. B. N. S. 454.

³ 2 Bl. Com. 17, 42; Bouv. Dict. "Farm"; and see Aldrich v. Gaskill, 10 Cush. 155.

⁴ Co. Litt. 5 a; Shep. Touch. 93; Belasyse v. Lucan, 9 East, 448; 1 Jarm. Wills, 785; Griscom v. Evens, 40 N. J. L. 402. "Freehold farm and lands"

may pass copyholds, where there is no residuary devise. 31 Ch. D. 314.

⁵ Gafney v. Kenison, 64 N. H. 354.

⁶ Co. Lit. 4 b; 2 B. & Ad. 42; Blann v. Bell, 2 D. M. & G. 781; 1 Jarm. Wills, 797; Sammis v. Sammis, 14 R. I. 123; 2 B. & Ad. 30; Hawk. Wills, 120.

⁷ Mannox v. Greener, L. R. 14 Eq. 456; Earl v. Rowe, 35 Me. 414; Ryan v. Allen, 120 Ill. 648.

Such a devise without words of inheritance added, carried *prima facie* a life estate only; but under the Statute of Victoria, a fee simple rather is presumed, or at least the whole interest which the testator had power to dispose of.¹ But no such construction of a fee can avail in violation of the testator's true intention.²

Where one devises the "use and occupation" or the "free use" of land, a right to let or assign the interest is implied, and not personal use and occupation alone, unless the context imposes the narrower construction.³ And where land is specifically devised, rents accrued at the testator's death do not follow the land, but go rather to the residuum of the estate.⁴

§ 504. **Descriptions relating to Personal Property; "Mortgages"; "Securities for Money," etc.** — After much controversy it has been settled in the English courts that land held by the testator in security will pass by the words "mortgages" or "securities for money," and similar expressions, so as to give not only the land but the entire benefit of the mortgage security, to the person designated in the will, unless a contrary intent appear; on the broad principle that the testator meant to substitute the object of the bounty in his own place as mortgagee, and give him the full power to enforce the mortgage.⁵ Nor is this construction to be affected by terms descriptive of personal estate only, and by limitations or charges such as simply affect property of that character.⁶ Thus the legal estate in a mortgage will pass under the term "securities for money," although the bequest is made subject to the payment of debts and legacies or in trust for sale;⁷

¹ See 1 Vict. c. 26, § 28; *Hodson v. Ball*, 14 Sim. 571; *Mannox v. Greener*, *supra*; 1 Jarm. Wills, 791. Cf. *Collier v. Grimesey*, 36 Ohio St. 17.

² *Bowen v. Payton*, 14 R. I. 257.

³ 1 Saund. 181; 4 T. R. 177; *Hawk. Wills*, 119; 4 Jur. N. S. 199; 1 Jarm. 798.

⁴ *Parker v. Chestnutt*, 80 Ga. 12. See § 523.

⁵ 1 Jarm. Wills, 699, and cases cited; *King's Mortgage Re*, 5 De G. & S. 644;

Renvoize v. Cooper, 6 Mad. 371; *Hawkins Wills*, 48.

⁶ *Ib.* Money secured by a mortgage of land in fee is in substance personal property, and a gift of a mortgage security for money is a gift of all the testator's interest in both money and security; hence the fee of the land is carried. *Renvoize v. Cooper*, 6 Mad. 371.

⁷ 2 K. & J. 503; *Barber, Ex parte*, 5 Sim. 451.

though under a devise of "lands," as we have seen, such restrictions would have prevented the legal estate from passing.¹

A bequest of "securities for money" will not pass shares in a stock company organized under English laws, nor perhaps in our American sense; for stock is a sort of incorporeal chattel of a different description, and a certificate of shares is not a security.² Nor does a bequest of "money and securities for money" carry a debt which is unsecured.³ But to this word "security" present usage gives a generous scope far beyond its literal meaning; and bills of exchange, bonds, public and private, and judgments have thus passed under a will, not to mention mortgage notes, or property held in pledge.⁴

§ 505. **The Same Subject: Gift of "Money" or "Moneys," "Cash," etc.**—The word "money" is often used, by the uneducated at least, in a vague but extensive colloquial sense, as though to embrace all of one's personal property, and not gold and silver coin and paper currency alone. A bequest of "money" standing by itself will not be presumed to carry bills of exchange, promissory notes, bonds, mortgages, stock, or other muniments in the nature of incorporeal chattels or securities payable in money.⁵ Not even public stocks are properly considered "money" under such a gift.⁶ But current bank notes on hand and such as constitute a legal tender should be included, as well as metal money.⁷ As for money not on hand, but in the hands of somebody else, there is some question; and despite Chief Baron Gilbert's remark that "money is a genus that comprehends two species, viz., ready

¹ *Supra*, § 495.

² *Ogle v. Knipe*, L. R. 8 Eq. 434; 21 L. J. Ch. 843.

³ *Mason's Will Re*, 34 Beav. 498. And see 1 Schoul. Pers. Prop. 2d ed. §§ 353, 375.

⁴ L. R. 8 Ex. 37; 3 De J. & S. 577; 1 Jo. & Lat. 475; 2 Wms. Exrs. 1192. So as to money due under a vendor's lien for unpaid purchase-money. *Callow v. Callow*, 42 Ch. D. 550.

⁵ *Hotham v. Sutton*, 15 Ves. 327; *Kay*, 369; *Beatty v. Lalor*, 15 N. J. Eq. 108; 1 Jarm. Wills, 768; *Hawkins Wills*, 49; 1 Schoul. Pers. Prop. § 352; 2 Wms. Exrs. 1189, 1190; 1 Turn. & Russ. 272.

As to money and its legal significance, see 2 Schoul. Pers. Prop. 2d ed. §§ 335-352.

⁶ *Hotham v. Sutton*, *supra*.

⁷ *Brooke v. Turner*, 7 Sim. 671.

money and money due,"¹ neither an unpaid legacy nor an unpaid debt, secured or unsecured, from a third party, nor any other unrealized money right, will pass *prima facie* as money.² But money on special deposit with another, and even money due on general deposit from a bank, is favorably regarded as passing under a will;³ while as to a savings-bank deposit, earning interest and not subject to check, there is some conflict.⁴

But that vague and comprehensive sense of which the word "money" is capable, justifies any court of construction in giving a much wider sense to this word when reference to the context shows it to have been the testator's real meaning. And accordingly the general residue of one's whole personal estate will pass under such a bequest, wherever a just consideration of the whole will and the circumstances of the testator requires this construction;⁵ as when, for instance, the debts, funeral expenses, and legacies are directed to be paid out of this "money"; or a complete disposition would be impossible under the narrower interpretation.⁶ And once more the context may give "money" an enlarged sense,

¹ Gilb. Eq. Rep. 200.

² Mason's Will *Re*, 34 Beav. 494;

⁴ Kay & J. 426; L. R. 16 Eq. 475. Money to be paid for a service not completed at the testator's death, or payable upon some contingency not determined, does not pass under a bequest of "money." 7 D. M. & G. 55; 3 Beav. 342.

³ 7 D. M. & G. 55; Johns. (England) 49; Parker v. Marchant, 1 Phill. 360; Beatty v. Lalor, 2 McCart. 110; 2 H. L. Cas. 31. Money at a bank on general deposit is in fact a "debt," and may pass under a bequest of "debts." 1 Mer. 541 n; 2 H. L. Cas. 31.

⁴ Cf. Beatty v. Lalor, *supra*, and Dabney v. Cottrell, 9 Gratt. 580. "All my moneys after paying my just debts" may pass savings-bank deposits and railroad stock under a will with no residuary clause. Fowler v. Fowler, 63 N. H. 244. And see Decker v. Decker, 121

Ill. 341. "Residue of my money" is construed to include shares of stock and securities for money in Smith *Re*, 42 Ch. D. 302. And see 37 Ch. D. 481.

⁵ Rogers v. Thomas, 2 Keen, 8; 2 Dm. & W. 51; Prichard v. Prichard, L. R. 11 Eq. 234; Morton v. Perry, 1 Met. 469; Smith v. Davis, 1 Grant, 158; Fulkeron v. Chitty, 4 Jones Eq. 244; Paul v. Ball, 31 Tex. 10. The claim on an unsatisfied judgment may be included under a residuary bequest of "all the money I have or may have at my death," etc. 72 Tex. 224.

⁶ 1 Jarm. Wills, 769-773; Legge v. Asgill, cited 4 Russ. 369; Waite v. Coombes, 5 De G. & S. 676; Morton v. Perry, *supra*; Hawkins Wills, 51. A gift of the "balance of my money" is sometimes construed in the wills of ill-educated persons, as importing a gift of all the residue of the estate, both real and personal. Miller *Re*, 48 Cal. 165.

yet so qualified as to fall short of embracing the entire residue.¹

Other terms than simply "money," are often used in this connection. "Money due to me" implies more than "money"; and a bequest in these words may carry an unpaid legacy from some other estate,² or the amount payable on a life insurance policy,³ or some other unpaid debt which stands due at the testator's death. "Ready money" and "cash," on the other hand, are terms so specific as to require a stricter interpretation than the word "money" by itself; and yet "ready money" (and "cash" too, as it seems) may include cash at a bank on current account, for it is subject to the depositor's check at any time.⁴ "Ready money" does not, however, include dividends on stock uncollected and uncalled for;⁵ nor debts and claims generally, whose collection is requisite before the money is actually in hand and available. "Cash" is a word of import at least as strict as "ready money"; and so is "money in hand."⁶

§ 506. **The Same Subject: "Movables."** — As mobility is the leading essential quality of personal as contrasted with

¹ 1 Jarm. Wills, 774. Where, for instance, the will shows that public stock was included; or accounts with various persons and not a bank account alone. 26 Beav. 218; 6 Sim. 67; and see Paup v. Sylvester, 22 Iowa, 371.

² Bainbridge v. Bainbridge, 9 Sim. 16. Otherwise where the estate out of which the legacy is payable has not yet been got in. Martin v. Hobson, L. R. 8 Ch. 401.

³ Petty v. Willson, L. R. 4 Ch. 574. Cf. 3 Beav. 342; Delameter's Estate, 1 Whart. 362.

⁴ Parker v. Marchant, 1 Phill. 356. "Everybody speaks of the sum which he has at his banker's as money; 'my money at my banker's' is a usual mode of expression. And if it is money at the banker's, it is emphatically ready money, because it is placed there for the purpose of being ready when occasion requires." *Per curiam* in Parker

v. Marchant, *ib.* So, we may add, is it common for one to speak of his "cash in bank," meaning what he can use as cash; and a man pays one bill he owes in coin or current notes, and another by a check upon his bank.

⁵ May v. Grave, 3 De G. & Sm. 462.

⁶ "Cash" or "money in hand" will generally pass money on deposit with a bank, as well as "ready money." And *per contra* will not carry a promissory note. Beales v. Crisford, 13 Sim. 592; Johns. 49.

"Ready money" has under peculiar circumstances been held to embrace, for the husband's benefit under a wife's will, the money he had collected for her by her authority and expended for household expenses; all her ready money "in bank or elsewhere" being bequeathed to him. Smith v. Burch, 92 N. Y. 228.

real property, "movables" may well denote "personal property" in the widest sense of the law.¹ But as between corporeal and incorporeal personalty, an uncertain stand is taken in the construction of wills; and the disposition of the court appears unfavorable to passing incorporeal personalty by presumption, or at least debts and money rights, or what our earlier law denominated the *chose in action*.²

§ 507. **The Same Subject: Gift of Interest or Produce of Personalty.**—Where the gift is made of the interest or produce of a fund to the legatee or in trust for him, without any limitation as to the term of enjoyment, it will be presumed an absolute gift so as to carry the principal also, though no mention be made of the principal.³ But this presumption, like others, may be controlled by the context; and that which is given as a life annuity cannot be strained by construction into an absolute estate.⁴ A life estate thus given, however, is not to be regarded as a strict annuity, in the sense that no apportionment is permitted on the death of the life beneficiary.⁵ In short, the bequest of the interest, income or produce of a fund to one and his heirs forever, or without limit as to continuance or time, is a bequest of the *corpus* of the fund itself; and this effect will be given by construction, whether the gift be made directly to the legatee or through a trustee's intervention.⁶ This holds especially true where the will makes no gift over, for a partial intestacy should not be presumed.⁷

§ 508. **Descriptions relating to both Realty and Personalty; "Goods"; "Chattels."**—The word "chattels," and perhaps

¹ 1 Schoul. Pers. Prop. 2d ed. §§ 3, 4. Page v. Leapingwell, 18 Ves. 463; 3
² Perniman v. French, 17 Pick. 404; Ohio St. 369. And see Hawk. Wills,
 Jackson v. Vandersprengle, 2 Dallas, 123; Hatch v. Bennett, 52 N. Y. 359.
³ Strong v. White, 19 Conn. 238. ⁴ 2 Wms. Exrs. 1195; Blewitt v. Rob-
⁵ 2 Wms. Exrs. 1194 and cases cited; erts, 1 Cr. & Ph. 274; Hawk. Wills, 125.
⁶ 1 Bro. C. C. 532; Mannox v. Greener, ⁷ Stone v. North, 41 Me. 265.
 L. R. 14 Eq. 456; Emery v. Wason, ⁸ Lorton v. Woodward, 5 Del. Ch.
 107 Mass. 507; 132 Mass. 473; Stretch 505; Bishop v. McClelland, 44 N. J.
 v. Watkins, 1 Madd. 253; 7 Sim. 178, Eq. 450.
 197. An indefinite gift of dividends ⁹ Cases supra; Given v. Hilton, 95
 gives the absolute property of the stock. U. S. 591.

the word "goods," and certainly the term "goods and chattels," in a will should be presumed to carry the whole personal estate of every description, if unrestrained by the context, including corporeal and incorporeal property of the nature of movables.¹ But while *choses in action*, or incorporeal money rights are embraced under this description, it has been ruled that a bequest of "goods and chattels" or of "personal property" in a certain place would not include *choses in action*, because these have no locality otherwise than by drawing a probate jurisdiction to them.² Context and the circumstances may solve the testator's intention on this point when doubt or difficulty arises, and the association of words less comprehensive may confine the meaning of the more comprehensive.³

§ 509. **The Same Subject: "Effects"; "Possessions"; "Things."**—"Effects" is a word often found in wills: and being equivalent to property or worldly substance, its force depends greatly upon the association of the adjectives "real" and "personal." "Real and personal effects" would embrace the whole estate; but the word "effects" alone must be confined to personal estate simply, unless an intention appears to the contrary.⁴ A bequest of "all my effects" may doubtless be so controlled by associated words and the context and surrounding circumstances as to fail of their full natural force:⁵ but naturally those words carry the whole personal estate.⁶

¹ Kendall v. Kendall, 4 Russ. 370; 1 Jarm. Wills, 751; 2 Wms. Exrs. 1178; Moore v. Moore, 1 Bro. C. C. 127. The word "chattels" includes animals and chattels real, but "goods" standing by itself appears less comprehensive. 1 Schoul. Pers. Prop. 2d ed. § 16.

² Moore v. Moore, *supra*; Brooke v. Turner, 7 Sim. 681; Penniman v. French, 17 Pick. 404; 1 Wms. Exrs. 1178.

³ The words "goods or movables" in a will carry bonds and money unless a different intention appears. 1 Yeates, 101. See § 509, note.

⁴ Sch. Pers. Prop. 2d ed. § 16; Hick v. Dring, 2 M. & S. 448, criticising earlier authorities; Haw v. Earles, 15 M. & W. 450.

But the context may show that real estate was also intended; as where the testator, referring to a previous devise, speaks of "my said effects"; or directs those to whom his "effects" are given to pay an annuity out of his real and personal estate. 15 East, 394; 2 Jur. 610; Hawkins Wills, 55, 56; Page v. Foust, 89 N. C. 447.

⁵ Ennis v. Smith, 14 How. 400.

⁶ Hodgson v. Jex, 3 Ch. D. 122. "All

In the old English law possession and seisin were distinguished; the latter term could not apply to an estate less than freehold, but the former might. Where one gives his "possessions" by will, the word seems applicable *prima facie* to both real and personal property, as it certainly is where associated words and the context imply such an intention. But the word "possessions" is seldom used by a professional draftsman; and whenever used, its scope must yield to the testator's probable meaning.¹

By "things," as opposed in law to the word "persons," is to be understood whatever may be owned of subjects not human;² so that the term appears a comprehensive one, synonymous with property in our present law. But some cases appear to have given it a limited sense in construction, as though confined to the tangible and not extending to *choses in action* where the bequest is of "all things" in a particular place.³

§ 510. **The Same Subject: "Estate"; "Property."**—The word "estate" is a general term, and in modern construction may be said to embrace *prima facie* the whole estate of the testator, both real and personal, and his property of every description.⁴ And the same may be said of "property," a word which comprehends all things of every nature, to which one may be entitled to the exclusion of others.⁵ But in many

my silver, jewelry, and other personal effects" does not include valuable railroad stock, as against a residuary legatee. 74 Ga. 124. And see § 514.

¹ *Blaisdell v. Hight*, 69 Me. 306; *Clark v. Hyman*, 1 Dev. L. 382.

² *Bouv. Dict. "Things."*

³ *Popham v. Lady Aylesbury*, Ambl. 68. *Cf.* 1 Sch. & Lef. 318, a decision of doubtful authority for the present day. See also § 508.

Apart, perhaps, from property purely incorporeal, like the primitive debt, money right, or *chose in action*, it seems to this writer that incorporeal chattels evidenced by muniment or security, like bonds, promissory notes, chattel mortgages, savings-bank books, stock,

etc., should pass, out of regard to the place where such muniment is kept, and that this best accords with a testator's natural intention. See § 512, notes.

⁴ 1 Salk, 236; *Barnes v. Patch*, 8 Ves. 604; *Hamilton v. Hodsdon*, 6 Moo. P. C. 76; *Hunt v. Hunt*, 4 Gray, 190; *Smith v. Smith*, 17 Gratt. 276; 32 Miss. 107; *Archer v. Deneale*, 1 Pet. 585; *Den v. Drew*, 14 N. J. L. 68; *Jackson v. Delancy*, 11 Johns. 365. And see *Given v. Hilton*, 5 Otto, 591.

⁵ *Bouv. Dict. "Property";* *Spears* Ch. 48; 5 Hayw. 104; *Rossetter v. Simmons*, 6 S. & R. 452; *Morris v. Henderson*, 37 Miss. 492; *Browne v. Cogswell*, 5 Allen, 364.

of the older cases the disposition shown was to confine "estate" in meaning as descriptive of personal property only, wherever this was possible, by which means the heir-at-law was of course favored.¹ Associated words which pertain exclusively to personal property, and the context generally may of course indicate that the term "estate" or "property" was applied in the narrower sense in some particular will.²

§ 511. **The Same Subject: Miscellaneous Terms of Description.**—Wherever a will purports to dispose of real and personal property in the same terms and in the same connection, and it is manifest that the testator intended both to go together, the will must be so construed.³ And in various instances the general residue of a testator's estate, and more especially of personalty, is held to pass under quite informal words and expressions, from which a suitable intent may be gathered.⁴

In short, a careful study of the decided cases will show not only that words loosely or inaccurately written may be changed in construction from their meaning as they stand, so that terms which literally import personalty may instead be taken as descriptive of realty,⁵ or *vice versa*, but that words which in their natural sense are applicable exclusively to the one kind of property, may by force of the context be held to include the other also.⁶ Such an interpretation will not,

¹ Hawkins Wills, 54; O'Toole v. Browne, 3 E. & B. 572; 6 T. R. 610.

² See e.g., as to "property," Brawley v. Collins, 88 N. C. 605; 1 Dev. L. 382; Wheeler v. Dunlap, 13 B. Mon. 291. Equity will not presume the deviser meant to include in a devise of his "estate" property which in equity was not his own. 2 Bibb, 407. As to carrying community property, see Haley v. Gatewood, 74 Tex. 281.

The word "estate" in a devise is descriptive of the subject of property, or the quantum of interest, according to the context. Hammond v. Hammond, 8 Gill and J. 436; Jackson v. Merrill, 6 Johns. 185; Hart v. White, 26 Vt. 260.

Under a bequest of "all my property of every description," money, *choses in action*, and chattels incorporeal as well as corporeal will pass. Hurdle v. Outlaw, 2 Jones Eq. 75.

³ Ireland v. Parmenter, 48 Mich. 631.

⁴ 1 Jarm. Wills, 775; Leighton v. Bailie, 3 M. & K. 267; Bassett's Estate *Re*, L. R. 14 Eq. 54. "All the rest" may pass, both real and personal property. Attree v. Attree, L. R. 11 Eq. 280.

⁵ Doe v. Tofield, 11 East, 246; 2 Wms. Exrs. 1079; Evans v. Crosbie, 15 Sim. 600.

⁶ Williams v. McComb, 3 Ired. Eq. 450; 18 Jur. 445.

however, be given upon doubtful and ambiguous expressions.¹

§ 512. **The Same Subject.**—The cases are very many which involve the description of particular words denoting property; but as social manners change and wills are liable to vary incessantly, both as to the use and force of the language employed, the value of the precedents as establishing rules is by no means proportioned to their number; and a brief reference in the foot-notes may serve well enough our present purpose.²

¹ *Haw v. Earles*, 15 M. & W. 450.

² In 2 Wms. Exrs. Pt. III. Bk. III. c. 2, American edition with Perkins's notes, may be found an extensive collection of the precedents, in point; all of them, however, bending to the apparent sense disclosed by the testator in each particular case, and especially restrained in gifts not residuary.

"Household goods" will pass all corporeal chattels of a permanent nature and not consumed in their use, that are used in, or acquired by, a testator for his house, and contribute to its convenience or ornament. 2 Wms. Exrs. 1180, 1185; 1 Rop. Leg. 225; *Carnagy v. Woodcock*, 2 Munf. 234; *Ambl.* 611. But not things which happen to be in the house and are even useful for household purposes, but were put there in the way of trade; as 700 beds used for hospital purposes under a contract with the government. *Ib.*; *Pratt v. Jackson*, 1 Bro. P. C. 222. Family plate will thus pass, if in actual use. 2 Wms. 1181. But not articles like wine, malt, and victuals, whose use consists in their consumption. *Slanning v. Style*, 3 P. Wms. 334; 3 Ves. 311. Other words associated with "household furniture" may, of course, extend or restrict the sense. See *Dennett v. Hopkinson*, 36 Me. 350. A watch carried usually on the person does not pass as "household furniture," nor is it "wearing apparel." *Gooch v. Gooch*, 33 Me. 535; *Sawyer v. Sawyer*, 28 Vt. 245. "Furniture" is broadly construed in 41 N. J. Eq. 93.

Whether it includes a piano, see 59 N. H. 242. See also *Chase v. Stockett*, 72 Md. 235, 240, where china and plated ware found in the house were held to be included. "The terms 'furniture,' or 'household furniture,' when not associated with less comprehensive words, embrace everything in the house that has usually been enjoyed therewith; and in this case would have passed the portraits and silver ware, had they not been expressly excepted." *Ib.*, citing various English and American authorities. Where the phrase "personal property and furniture" occurs, it is inferred that the testator distinguished between them. 2 Demarest, 633. "Money" does not pass as "household furniture," though contained in a secret drawer of an article of furniture. *Smith v. Jewett*, 40 N. H. 513. Or in a safe, 124 N. Y. 388. As to books, *cf. Kelly v. Powlet*, *Ambl.* 611; 3 Ves. 311; *Ouseley v. Anstruther*, 10 Beav. 462. And see 2 Wms. Exrs. Am. ed. 1181-1187, and Perkins's notes. It is obvious that an enumeration of some of the specific things which the testator means to bequeath is desirable in a bequest of this character. A bequest of "all the household property in the dwelling-house" will include the wood and coal there and a shot-gun. *Frazer Re*, 92 N. Y. 239.

In a recent case a will gave to A "all my household effects, books and papers of value, and everything the house contains." This last sweeping

§ 513. **Description of Gift; Devise; Bequest; etc.** — We may add that while a devise relates in strictness to lands,¹ and is

expression was treated as restrained by the words preceding; and it was held that neither a note of \$100, nor a savings-bank deposit evidenced by a book found with the note among the testator's papers, was included. *Webster v. Weirs*, 51 Conn. 569.

As to "stock on farm," "stock in trade," "plantation stock," "plant and good will," &c., numerous precedents may be found; and wide effect is given to the testator's intention of passing here not articles of domestic enjoyment so much as what aids in carrying on the business pursuit of agriculture or trade. See 1 Wms. Exrs. 1187, 1188, and Perkins's notes; 3 Atk. 64; 9 M. & W. 23; 4 Jones Eq. 203; 19 Tex. 553. Stock of medicine, &c., "belonging to or contained in my store," held not to include whiskey in bond upon which excise duty had not been paid. 58 Md. 575. For a devise and bequest of one farm with "stock, grain, and farming utensils" to A, and another farm with "stock and farming utensils" to B, and the residue of the estate to C, see *Baker v. Baker*, 51 Wis. 538. A devise of personal property "belonging to or used in connection with" the farm, etc., does not include wheat harvested before the testator's death and on the farm awaiting the market. *Kempf's Appeal*, 53 Mich. 352.

"Property at my bank" is held to pass a cash balance, and also shares of stock in the bank's custody for collection of dividend. *Prater Re*, 37 Ch. D. 481.

To carry life-insurance money differently from what the policies contemplate is not to be taken by implication as a testator's intent. *Blouin v. Phaneuf*, 81 Me. 176; 76 Tex. 293. Yet a policy payable to one's legal representatives may be disposed of by will. See *Aveling v. Association*, 72 Mich. 7; 83 Me.

The word "etc.," added to a particular enumeration of bequeathed articles, does not carry articles of a different kind, not used in connection with the foregoing. 152 Mass. 353.

A bequest of a bond having an overdue coupon attached, at testator's death, carries the coupon also. *Ogden v. Pattee*, 149 Mass. 82. A bequest of bonds in general will carry the severed coupons. *Sanborn v. Clough*, 64 N. H. 315.

Under a bequest of one's "debts" may pass a draft in the testator's favor, and a cash balance at his banker's. 1 Meriv. 541. See also 3 Meriv. 434; 11 Ves. 356; 2 Wms. Exrs. 1198.

A bequest of a bond, note, etc., bearing interest, carries the interest due thereon. *Perry v. Maxwell*, 2 Dev. Eq. 448; 2 Keen, 274; 13 C. B. 205. But cf. 2 Atk. 112; *Harvey v. Cooke*, 4 Russ. 34.

The word "north" in a devise may mean northerly, northeasterly, or northwesterly. *Weare v. Weare*, 59 N. H. 293. And see 71 Me. 596.

A bequest of "wearing apparel," etc. and "jewelry, contained in eight trunks" may pass jewelry contained in a valise. 30 How. Pr. 265. "Corn, fodder, meat, and other provisions on hand," may include wine and brandy which the testator had provided for his own use. *Mooney v. Evans*, 6 Ired. Eq. 363. From regard to context, railroad and State bonds may pass under the description of "bank stock." *Clark v. Atkins*, 90 N. C. 629.

A bequest of "bank stock" will carry savings-bank deposits, the testator having no bank stock. *Tomlinson v. Bury*, 145 Mass. 346. As to "shares," see 37 Ch. D. 683.

The gift of a "trunk and its contents" is not controlled by an unattested paper

¹ *Supra*, § 3.

distinguishable from what is bequeathed, the terms "devise and bequeath" are often conveniently associated. But, in furtherance of a testator's intent, the words "bequeath" and "devise" may in any will be treated as synonymous, if the context requires it;¹ and the words "devise," "legacy," and "bequest" may be applied indifferently to real or personal property.² But where the testator uses words in their technical sense that sense must of course prevail.³

§ 514. **Description of Gift; General Terms how far restrained by Particular Enumeration.**—But here let us observe more generally of terms which describe a gift by way of devise or bequest, that a general and comprehensive term such as "effects," "goods," "chattels," may be restrained in sense to less than their natural import in a given case by the context and associated words under the will. For it is a rule of presumption, especially in clauses not residuary, that where a more general description is coupled with an enumeration of things, the description shall cover only things of the same kind;⁴ and doubtless words of general description may by due regard to the context be considered as limited by an attempt at particular description.⁵ Thus a bequest ending "and everything the house contains" may be restrained in effect by prior words detailing the kind of things.⁶ And so, too, where a previous enumeration of such articles as gold rings, a chest, a box, is followed by the sweeping clause "and

inside the trunk directing that money shall be used for certain purposes. *Magoohan's Appeal*, 117 Penn. St. 238. Whether a savings-bank book inside would be thus bequeathed, *quare*. *Ib*. In a recent English case, where the old objection to passing *choses in action* was discussed, the gift of a desk with its contents was held to carry various checks and promissory notes, as well as coin and bank notes. *Robson Re*, 2 Ch. (1891) 559. But a key found inside the desk gave no title to a box of securities elsewhere, which the key unlocked. *Ib*.

See further *Wolf v. Schoeffner*, 51

Wis. 53; *Edmondson v. Bloomshire*, 11 Wall. 382.

¹ *Dow v. Dow*, 36 Me. 211; *Brown v. Taylor*, 1 Burr, 268; *Thompson v. Gaut*, 14 Lea, 310.

² *Ladd v. Harvey*, 21 N. H. 514. "Legatee" may be read "devisee" or "distributee," as circumstances require. 15 Sim. 600; 23 Geo. 571.

³ *Hazelrig v. Hazelrig*, 3 Dana, 48.

⁴ *Given v. Hilton*, 5 Otto, 591.

⁵ *Allen v. White*, 97 Mass. 504; *Urlich's Appeal*, 86 Penn. St. 386; 124 Mass. 111; *Freeman v. Coit*, 96 N. Y. 63; *supra*, § 475; 30 Ch. D. 92.

⁶ *Webster v. Weirs*, 51 Conn. 569.

all things not before bequeathed," the court has excluded a leasehold right from the bequest.¹ Hence does it happen, as we have already seen, that words so comprehensive when standing alone as "effects," "goods," "chattels," or even "estate" or "property," may by their juxtaposition with words less broad be treated as restrained within narrower limits; the generic being controlled by the specific, by the particulars which describe the property intended.²

Among the circumstances which bear in favor of reducing the natural scope of general words which a testator uses in description are these: that a subsequent specific bequest is made to the same legatee;³ or that particular dispositions have followed in favor of other persons;⁴ or that the clause is not residuary in character; or, more strongly still, that explanatory and restrictive expressions occur afterwards in connection with the gift.⁵ And the indisposition of courts appears strongest, when *choses in action* or incorporeal personality (which may be evidenced in mere writing to a considerable value), or even money, is claimed, where the particular description indicates that only corporeal chattels whose intrinsic worth depends upon what is visible and tangible were in the testator's mind.⁶

But this rule of restraining a more general description by the context and by associated words of narrower import, is after all but a rule of presumption, as we should bear carefully in mind. It yields to the testator's intent as gathered from the whole instrument.⁷ Thus, if a will in its general descrip-

¹ Cook v. Oakley, 1 P. Wms. 302.

² § 512, note; 1 Jarm. Wills, 751; Peaslee v. Fletcher, 60 Vt. 188.

³ Rawling v. Jennings, 13 Ves. 39; Richardson v. Hall, 124 Mass. 228; 1 Johns. Ch. 329.

⁴ Wrench v. Jutting, 3 Beav. 521.

⁵ 1 Jarm. Wills, 753, 754. As where the will says: "*Whatever I shall have at my death*, as plate, jewels, linen, household goods, coach and horses." Timewell v. Perkins, 2 Atk. 103. Or "*goods*, wearing apparel, of what nature and kind soever, except my gold

watch." Crichton v. Symes, 3 Atk. 61. Where "etc." follows words of particular description, things *ejusdem generis* is meant. 26 Beav. 220; Barnaby v. Tassell, L. R. 11 Eq. 363; Woodcock v. Woodcock, 152 Mass. 353.

⁶ Benton v. Benton, 63 N. H. 289. The gift of the income of stocks and bonds implies further that the principal is not given. *Ib.* And see Reynolds R., 124 N. Y. 388.

⁷ 1 Jarm. Wills, 755-758; Bennett v. Bachelor, Bro. C. C. 29; 1 Russ. 276; Martin v. Smith, 124 Mass. 111; Urich's

tion purports to dispose of all the personal property, or of all the property real and personal, and charges the legatee with the payment of other legacies, a broad residuary gift may fairly be implied, notwithstanding an enumeration of particulars.¹ And so, too, where the enumeration of particulars seems to lead up to a sweeping general term which is added by way of embracing whatever remains unmentioned,² and the whole effect is that of a residuary bequest.³ Nor is it essential to the broader construction that the generic term should follow the specific, for there may be a general term, followed by what was meant to be an enumeration (as under a *videlicet* or "namely") but a defective one in particulars.⁴ A misdescription of the particular will not vitiate the correct general description.⁵ And Mr. Jarman considers it a conclusive ground in favor of the enlarged sense of an equivocal gift, that the bequest contains an exception of certain things which would not have been comprised under the narrow sense; since the testator, by showing that without this exception the gift would have included the excepted articles, has afforded a key to his own ambiguous meaning.⁶

In fine, courts at the present day decline to be hampered by any rule which would sacrifice the testator's true meaning out of undue regard for the association of words of limited scope with broad generic terms; and the modern inclination

Appeal, 86 Penn. St. 386; *supra*, § 475; Given *v.* Hilton, 5 Otto, 591.

¹ Chapman *v.* Chapman, 4 Ch. D. 800.

² Campbell *v.* Prescott, 15 Ves. 503; 5 Mad. 69; 6 Mad. 119; Arnold *v.* Arnold, 2 My. & K. 365. Lord Cottenham's statement in Arnold *v.* Arnold seems to be generally accepted by the later English authorities, though it conflicts with some earlier cases; namely, that "the mere enumeration of some items before the words 'other effects' does not alter the proper meaning of those words." Hodgson *v.* Jex, 2 Ch. D. 122.

³ Taubenhan *v.* Dunz, 125 Ill. 524. "All my cattle" may be restrained by

construction to cattle used merely for stock. 64 Tex. 22.

"Ornaments" from the context may include articles of jewelry. 75 Cal. 189.

⁴ Fisher *v.* Hepburn, 14 Beav. 627; and see remarks of Romilly, M. R., in *ib.* This case is followed in Dean *v.* Gibson, L. R. 3 Eq. 717, and King *v.* George, 5 Ch. D. 627.

⁵ Martin *v.* Smith, 124 Mass. 111; Freeman *v.* Coit, 96 N. Y. 63.

⁶ 1 Jarman. Wills, 756, citing in point Hotham *v.* Sutton, 15 Ves. 319. This question, though arising usually under gifts of personalty restricted to a certain locality, is equally applicable to other cases. 1 Jarman. 756.

both in England and America is to treat words of general description as unlimited in sense by an attempt to state particulars where the will as a whole discloses no intention to the contrary; though not of course where this favorable presumption is overcome.¹

§ 515. **The Same Subject.** — But as Mr. Jarman observes, where the general term has been treated as unrestrained by the particular enumeration, there was no other bequest capable of operating upon the general residue of the testator's estate than the clause in question.² Partial intestacy under a will is a conclusion to be avoided in construction if possible;³ but where such an alternative is needless, inasmuch as another clause in the will contains a residuary provision, and a consistent and effective interpretation of the testator's whole meaning is thereby given, an argument arises in favor of restraining the effect of the doubtful bequest.⁴

Property which is devised or bequeathed may be plainly enough described, although reference be made in aid of the description to some other document which cannot be found.⁵

§ 516. **A False Description does not vitiate, etc.** — Latin maxims borrowed from the civil law are not unfrequently applied in the construction of a devise. One of these maxims, and a familiar one, is that a false description does not injure;⁶ that is to say, that where the description is made up in part of what is true and in part of what is false, the untrue part will be rejected as not vitiating the devise, if the part which is true describes the subject with sufficient certainty.⁷ The description so far as it is false is taken to apply to no subject at all, and so far as it is true, to one

¹ See *supra*, § 475; 1 Jarm. Wills, 759.

Where a sum of money is bequeathed, "including" all notes, etc., the notes do not pass in addition to the sum, but as a part of it. *Henry v. Henry*, 81 Ky. 342.

² 1 Jarm. Wills, 760, 761.

³ *Supra*, § 490.

⁴ *Woolcomb v. Woolcomb*, 3 P. Wms. 112; 2 D. & Wa. 59; 1 Jarm. Wills, 761; *Reynolds Re*, 124 N. Y. 388.

⁵ *Beckett Re*, 103 N. Y. 167.

⁶ *Falsa demonstratio non nocet cum de corpore constat.*

⁷ 1 Jarm. Wills, 785.

subject only.¹ This maxim must be taken in furtherance of a testator's intention and not to subvert it.

For instance, where one plainly identifies the premises devised by him, and yet calls them "freehold" when in fact they are "leasehold," or *vice versa*,² or describes the house as tenanted by A when it was tenanted by B, or purchased of A when it was purchased of B; or mentions the farm he gives by will as consisting of about 130 acres when it was much larger or much smaller;³ or where he describes a lot accurately except as to the initial point;⁴ in these and similar instances the plain identification in the main of what is devised carries the property, and the subordinate misdescription which is superadded may be thrown out in construction as surplusage.⁵ In fact, wherever it is clear that the testator intended to pass specific property by his will, it will pass notwithstanding a misdescription of the property, so long as there is enough correspondence to afford the means of identifying the subject of the gift.⁶

To pursue this subject farther. A gift by words of general description, we have seen, is not to be limited by a subsequent attempt at particular description.⁷ "All my real estate" has accordingly been held to embrace a parcel on the south side of the street, even though the lands were described as though all situated on the north side.⁸ And there are cases where premises are described as occupied by B when B manifestly occupied only part thereof.⁹ In short, testing such questions by the true meaning of the will, it may frequently happen that an estate definitely and fully described, may have

¹ *Morrell v. Fisher*, 4 Ex. 591, *per* Alderson, B.

² *Day v. Trig*, 1 P. Wms. 286; 7 M. & W. 1; *Cox v. Bennett*, L. R. 6 Eq. 422.

³ *Whitfield v. Langdale*, 1 Ch. D. 61; *Aldrich v. Gaskill*, 10 Cush. 155; *Bear v. Bear*, 13 Penn. St. 529. But where there are devises to different parties, and the actual quantity instead of that described would have left not land enough to satisfy all the devises, this is a cir-

cumstance which bears in favor of the more limited construction. *Tewksbury v. French*, 44 Mich. 100.

⁴ *Ehrman v. Hoskins*, 67 Miss. 192.

⁵ Cases *supra*; *Emmert v. Hays*, 89 Ill. 11; 8 Or. 303; *Wales v. Templeton*, 83 Mich. 177.

⁶ *Woods v. Moore*, 4 Sandf. 579.

⁷ *Supra*, §§ 475, 514.

⁸ *Martin v. Smith*, 124 Mass. 111.

⁹ *Cro. Car.* 129. *Cf.* L. R. 16 Eq. 177, *per* Lord Selborne.

some particular added which holds good of a part of the estate only, and may therefore be discarded in construction.¹ On the other hand, a particular misdescription cannot enlarge the premises whose general description identifies it plainly.²

§ 517. **But Particulars may qualify a General Description.** — But where, on the other hand, there is a clear enumeration of particulars which purport on their face to be designed as qualifications of a preceding general description, words of general devise must yield, and the maxim *falsa demonstratio non nocet* does not apply ;³ but rather the maxim, *ex præcedentibus et consequentibus optima fiat interpretatio*.⁴ And hence of two adjoining parcels it may appear that only one was given.⁵ Nor can words which describe the object of a devise be discarded as false demonstration unless they are clearly repugnant to other descriptive phrases of more importance.⁶

Where a devise gives the area and also describes by bounds, it is the latter description which controls.⁷ And where reference is made to a map or plan which is on public record for a description of the property, it is fair that the boundaries as therein described shall control, if no reason appears to the contrary.⁸ The same parcel of land may be described in a will by one or more references.⁹

§ 518. **Repugnant Description ; Language of Will not to be subverted.** — Where something is devised, and there are found two species of property, the one completely corresponding to the description, and the other not so completely, the latter will be excluded while the former takes effect.¹⁰ And generally, in case of a discrepancy between two modes

¹ 1 Jarm. Wills, 786, 787; 1 M. & Sel. 299; Down v. Down, 7 Taunt. 343; Drew v. Drew, 28 N. H. 489.

² Tyrell v. Lyford, 4 M. & S. 550; 1 Jarm. Wills, 789.

³ Griscom v. Evens, 40 N. J. L. 402; Drew v. Drew, 28 N. H. 489.

⁴ From what precedes and what follows, we must gather the best interpretation. And see § 514.

⁵ Griscom v. Evens, *supra*.

⁶ Evens v. Griscom, 42 N. J. L. 579.

⁷ Lyon v. Lyon, 96 N. C. 439.

⁸ Finelite v. Sinnott, 125 N. Y. 683.

⁹ As by reference both to the deed and to occupation under it. 115 N. Y. 290.

¹⁰ Ryall v. Bell, 8 T. R. 579; 4 M. & S. 550; 1 Jarm. 791, 792; Morrell v. Fisher, 4 Ex. 591.

of description, that mode will be followed which is the less liable to mistake.¹

Where, finally, the will clearly purports to give that which the testator has not, the court refuses to subvert its language, upon any conjecture, however plausible, that something of quite a different description was really intended; nor will evidence from without be admitted to show that what is not ambiguously expressed meant other than it purports.² Thus where a testator having lands in the county A, devises all his estates in county B, where he has nothing, the lands in the former county will not pass;³ and even though partial intestacy be the alternative, the rule is not changed. But an effect so disastrous is sometimes avoided by striking out erroneous particulars where there remains sufficient to identify the property with reasonable certainty. Thus where the will devised "lots 1 and 2 in block 187" when the testator owned no such lots, but lots 3 and 4 in that block, the property was treated as sufficiently identified by "block 187," after rejecting particulars as to the numbers of the lots.⁴

§ 518 *a*. **Real Estate with the Personalty thereon.** — Where a lot is devised and bequeathed with all the personal property thereon, it passes the live stock, even though the cattle sometimes grazed elsewhere.⁵ But under a mere devise of land and the buildings thereon, personal property stored in one of the buildings does not pass;⁶ but there must be such an actual

¹ Redding *v.* Allen, 3 Jones Eq. 358.

² See *supra*, § 478.

³ 8 Bing. 244; 1 Jarm. Wills, 795; 1 Mackey (D. C.) 468; Sturgis *v.* Work, 122 Ind. 134.

⁴ Moreland *v.* Brady, 8 Or. 303. See also Black *v.* Richards, 95 Ind. 184. But *cf.* Sherwood *v.* Sherwood, 45 Wis. 357, which appears *contra*. A devise of "my house and lot in the town of Patoka, Illinois," is held sufficiently definite in Allen *v.* Bowen, 105 Ill. 361. And see Severson *v.* Severson, 68 Iowa, 656. But the devise of a farm described will not carry a farm elsewhere. Christy *v.* Badger, 71 Iowa, 581; Bowen *v.*

Allen, 113 Ill. 53. *Cf.* 113 Ill. 327. The direction for a division of the testator's land may be void for uncertainty of description. Ehle's Will, 73 Wis. 445. See §§ 592-594. As to admitting extrinsic evidence of the testator's intent where the description was partly right, *cf.* §§ 573, 574, *et seq.* The distinctions run in the cases are sometimes very close.

⁵ Martin *v.* Osborne, 85 Tenn. 420.

⁶ Dana *v.* Burke, 62 N. H. 627. In this case a boat was stored in a barn. Nor would the boat pass under a bequest of household furniture. *Ib.*; § 512.

or constructive annexation to the realty as complies with the law of fixtures in order to divest a chattel of that original character.¹ Where, in the clause of a will not residuary, real estate is specifically devised and bequeathed, with all its lands, buildings, and appurtenances, "including all the furniture and personal property" in and upon the same, or in any manner connected with it, and there is a vault upon the premises which contained various incorporeal kinds of personalty, such as stocks and bonds at the testator's death, such securities are not presumed to be included but go rather to the residuary legatee.²

§ 519. **Residuary Bequest of Personalty; its Effect.** — A general residuary bequest of personal property operates upon all the personal estate which the testator may have at his death, and *prima facie* carries with it not only whatever remains undisposed of by his will, but whatever despite the will fails of disposition in the event from one cause or another.³ It includes in consequence both lapsed and void legacies, those which turn out void, and those which fail by the death of the legatee while the testator was alive.⁴ For a presumption (to quote from Sir Wm. Grant) arises in favor of the residuary legatee against every one except the particular legatee, since a testator is supposed to give his personalty away from the former only for the sake of the latter.⁵ And the English precedents require strong words in any will to rebut this presumption in favor of the residue.⁶

¹ *Ib.* And see generally, as to fixtures, 1 Sch. Pers. Prop. §§ 111-133.

² Reynolds *Re*, 124 N. Y. 388 and cases cited. And see §§ 514, 515.

³ 1 Jarm. Wills, 645, 761; Hawkins Wills, 40. All the personal property passes to the widow by the words "all the personal property is hers," though some is specifically mentioned as bequeathed to her. Risk's Appeal, 110 Penn. St. 171.

⁴ Brown *v.* Higgs, 4 Ves. 708; 2 Ves. 285; Tindall *v.* Tindall, 23 N. J. Eq. 244; Leake *v.* Robinson, 2 Mer. 392;

Drew *v.* Wakefield, 54 Me. 296; Firth *v.* Denny, 2 Allen, 471; Woolmer's Estate, 3 Whart. 480; 4 Barb. 90.

⁵ Cambridge *v.* Rous, 8 Ves. 25.

⁶ Bland *v.* Lamb, 2 J. & W. 406; 12 Jur. 547; 16 Ves. 451; Clowes *v.* Clowes, 9 Sim. 403; Leake *v.* Robinson, *supra*. Even where a residuary clause gives all "except" certain specific legacies (which happen to fail) or "not already disposed of," the courts incline to favor the residuary legatee in construction. 2 Coll. 516; 10 Beav. 276; 1 Jarm. Wills, 762; 20 Beav. 579.

Nevertheless, this strong presumption in favor of the residuary legatee, where personalty is concerned, is liable in any case to be rebutted, like any other presumption in testamentary construction; and where the will shows that the testator meant that the residuary gift should take only a limited effect, that meaning must operate.¹ Thus there may be an express reservation against the residue in language not to be mistaken.² And the gift of residue may be restricted by the context, or by provisions inconsistent with a more liberal construction.³ Moreover, as by "residue" we mean that which is only disposed of effectually in the residuary clause, any part of the residue which itself fails does not *prima facie* swell the remaining part of the residue, but goes as estate undisposed of.⁴ Where legacies are given to several legatees, and the residue is bequeathed to the same legatees, it follows that the residue will not include a lapsed legacy to one of them.⁵ In general, the comprehensive import of the word "residue" does not *prima facie* extend to a gift of that residue; for a gift "of the residue" of the residue of one's personal estate is, in fact, a gift of the residue of a particular fund.⁶

¹ 1 Jarm. Wills, 762; Hawkins Wills, 41

² Davers v. Dawes, 3 P. Wms. 40; Amb. 577; Kay, 507; 45 Minn. 48.

³ Ludlow v. Stevenson, 1 De G. & J. 496; Baker's Appeal, 115 Penn. St. 590.

⁴ Hawkins Wills, 41, 42; Sykes v. Sykes, L. R. 4 Eq. 202; Skipwith v. Caball, 19 Gratt. 786; 1 Jarm. 764; 1 Sw. 566; Humble v. Shore, 7 Hare, 247. For, should a residue be given in moieties, to hold that one moiety lapsing shall accrue to the other, would be to hold that a gift of the moiety shall eventually carry the whole. Plumer, M. R., in 1 Sw. 566. But this is after all a mere question of intention as before. 1 Jarm. 764; Evans v. Field, 8 L. J. N. S. 264.

⁵ Lombard v. Boyden, 5 Allen, 251; Craighead v. Given, 10 S. & R. 353.

⁶ Hawkins Wills, 43; 1 Sw. 566.

Thus, if the testator gives £10,000 out of the residue of his personal estate to A, and the residue to B, and the bequest to A fails, the gift to B will not generally carry this £10,000 to him, but the sum will go as undisposed of. Green v. Pertwee, 5 Hare, 249; 1 Sim. N. S. 115; White v. Fisk, 22 Conn. 35; Beekman v. Bonsor, 23 N. Y. 312.

The English rule under the Statute of Victoria regards a general residuary bequest as including not only personal property which the testator ineffectually attempts to bequeath, but property over which the testator has a general power of appointment and which he has by the will ineffectually appointed. Hawkins Wills, 41; Spooner's Trusts, 2 Sim. N. S. 129; 1 Johns. (Eng.) 276; § 526.

A gift of "all my personal property," the land having been devised specifically, may be presumed a gift of the personal

§ 520. **The Same Subject: General Bequest of a Particular Residue.** — Where a general bequest is made of chattels of a particular description, — as of all one's mortgages, or stocks, or moneys in bank, — the bequest will carry whatever chattels of that description the testator leaves at his death, whether less or more than he might have expected to leave when the will was made.¹ And by analogy to the doctrine of our preceding section, the general bequest of residue answering to this particular description will embrace all of that kind whose disposition has failed in the event from any cause.² But where the testator gives the residue, as of a definite sum or a definite ascertained fund, the bequest of a particular residue has no such comprehensive force.³

It may be of importance to consider, when construing a will, whether the word "residue" or the residuary gift, however expressed, comprises the general personal estate or is confined by the context to such portion of a particular fund already dealt with as remains undisposed of;⁴ for in this latter case the bequest of "residue," even in its widest sense, can carry no more than the particular residue.⁵ In a bequest of the residue of one's property "of every description," words which merely describe the different kinds thereof are not of limitation but illustration.⁶

§ 521. **Residuary or General Devise, and its Effect.** — As for a residuary or general devise of real estate, the rule has not corresponded in construction to that of the residuary bequest. In the first place, the old law permitting a testator

property remaining after the payment of debts. 110 Penn. St. 171.

¹ 1 Jarm. 691, 765; *Page v. Young*, L. R. 19 Eq. 501.

² *De Trafford v. Tempest*, 21 Beav. 564.

³ L. R. 2 Eq. 276; *Easum v. Appleford*, 5 My. & Cr. 56. As to the natural import of making an express charge upon the fund, see *Baker v. Farmer*, L. R. 3 Ch. 537; 11 Ch. D. 949. And see 1 Jarm. Wills, 765-767, where the

English cases are collated. The testator's intent as shown in the whole will solves all such questions, and dispenses with abstruse maxims under this head.

⁴ 1 Jarm. 767; *Boys v. Morgan*, 3 M. & Cr. 661.

⁵ *Jull v. Jacobs*, 3 Ch. D. 703; 58 How. Pr. 107.

⁶ *Burnside's Succession*, 35 La. An. 708. A residuary bequest may carry a recognized claim upon the government. *Pierce v. Stidworthy*, 79 Me. 234.

to devise only the real estate to which he was actually entitled when the will was made, and none acquired subsequently,¹ it followed that the devise, however general in terms, was in effect specific ; or rather it disposed specifically of what was not already expressed to be given by the will. On general principle the heir-at-law was favored as much as possible,² even to the detriment of a residuary devisee ; and accordingly a specific devise lapsing by the death of a devisee, the heir and not the residuary legatee took the advantage ;³ and in fact whether a devise lapsed or was void *ab initio*, the residuary devise did not absorb it.⁴ This rule has produced some refinements of construction which are no longer of much consequence ; for modern legislation both in England and America puts personal and real estate on substantially the same footing in this respect, treating both lapsed and void devises as accruing *prima facie* to the residuary fund ; so that consequently the residuary devisee or legatee shall take the essential benefit unless the will discloses an intent to the contrary.⁵ Moreover, in England and our several States, after-acquired real estate may pass by a will, and the instrument may speak with reference to all property, real or personal, as of the date when it comes into operation, or, in other words, when the testator dies.⁶

Under the statute policy, therefore, which applies to wills made within the last half-century, or thereabouts, the analogies of legacies and devises fairly harmonize in construction,

¹ *Supra*, § 29.

² *Supra*, § 479.

³ 1 Jarm. Wills, 645, 646; Goodright v. Opie, 8 Mod. 123; Fort. 182, 184; Prescott v. Prescott, 7 Met. 141.

⁴ Tongue v. Nutwell, 13 Md. 415. Some English authorities appear to distinguish in favor of a void devise, Lord Ellenborough, for instance. Stewart v. Sheffield, 13 East, 527; 33 L. J. Ch. 582; Hawkins Wills, 44. But lapsed and void devises stand in reason on the same footing. 1 Jarm. Wills, 647 and cases cited. And Lord Camden lays down the rule emphatically against the

residuary legatee wherever the testator intended to devise the residue exclusive of a part given away. Amb. 645. See also Ferguson v. Hodges, 1 Harring. 528.

⁵ Stat. 1 Vict. c. 26, § 25; Cogswell v. Armstrong, 2 K. & J. 227; Thayer v. Wellington, 9 Allen, 284; Deford v. Deford, 36 Md. 168; Massey's Appeal, 88 Penn. St. 470; 1 Jarm. Wills, 646, 651, and American notes; Drew v. Wakefield, 54 Me. 296; Kip v. Cortland, 7 Hill (N. Y.) 348.

⁶ *Supra*, §§ 29, 486; Stat. 1 Vict. §§ 3, 24.

so far as residuary gifts are concerned. The intention to carry lapsed and void devises, as well as the estate undisposed of, to the residuary devisee, is not to be defeated in construction by expressions like "all other land," or "all land not hereinbefore devised."¹ Yet an express reservation or exception against the residuary devisee or in favor of heirs would receive its due interpretation. So, too, the general devise of a particular residue, as of the rest of the testator's lands in the town of A, should receive a limited and particular effect.² And once more, if the general residuary devise fails to take full effect as to some aliquot share, the presumption is that so much of the land lapses to the heir as property undisposed of.³

§ 522. **Devise of Residue, etc., gives both Real and Personal Property.**—A devise of "all the residue" of the testator's property or of his estate, is presumed to pass real as well as personal property;⁴ meaning by "residue" whatever surplus may be left after all liabilities of the estate are discharged and the other specific purposes of the will carried into effect;⁵ and so with kindred expressions such as "all the rest and residue" or "all the rest, residue, and remainder."⁶ If heirs or kindred are expressly excluded from benefit under the will, all the clearer is the import of expressions like these.⁷ And a devise of rest, residue, and remainder in real estate will pass a fee, under the modern

¹ Green v. Dunn, 20 Beav. 6.

² Springett v. Jennings, L. R. 10 Eq. 488; ib. 6 Ch. 333; *supra*, § 521.

³ *Supra*, § 519; Greated v. Greated, 26 Beav. 621. And see 1 Jarm. 651, 652.

A devise and bequest of "all my estate, both real and personal, that I shall inherit as my portion after my father's death," receives full effect as to real estate, in 140 Penn. St. 325.

⁴ Faust v. Birner, 30 Mo. 414; Fraser v. Hamilton, 2 Desaus. 573; 1 Wash. 45; cases *infra*.

⁵ Jones Eq. 302; Smith v. Terry, 43 N. J. Eq. 659; 45 Minn. 48.

⁶ 2 Jones Eq. 215; 2 Desaus. 422; Parker v. Parker, 5 Met. 134; Smith v. Smith, 17 Gratt. 268.

⁷ Atkins v. Kron, 2 Ired. Eq. 58. A gift of "all the balance" of the testator's property, both real and personal, "to the exclusion of all others," clearly imports an intention to pass all the real estate of which the testator should die seized. Wynne v. Wynne, 23 Miss. 251. "Balance of my estate" is exhaustive, carrying both real and personal estate. Grimes v. Smith, 70 Tex. 217.

rule, even though no words of limitation or inheritance be added.¹

Such words as "rest," "residue," "remainder," are not indispensable to a residuary bequest of personal estate; but in various instances words and expressions quite informal have been given this effect, out of regard to the testator's obvious intention.² A devise of this character has been held, agreeably to the intent of the will, to carry all the real estate, although "money" was the term employed.³

§ 523. **Residuary Bequest or Devise as to Intermediate Income.**—A general residuary bequest, even though contingent in terms, will carry the intermediate income which is undisposed of but accumulates;⁴ or at all events until the law against long accumulation stops it and turns the stream to the next of kin.⁵ Even though this personalty or part of it is to be laid out in lands, the income like its *corpus* continues personalty meantime, and the rule holds good.⁶ But as for future specific bequests generally, the rule is that the intermediate income does not pass to the legatee before the period of vesting.⁷

On the other hand, devises of real estate to take effect at some future period, or when the devise itself is contingent or deferred in point of enjoyment, do not in general carry the intermediate rents and profits prior to the period of vesting; and whether the devise be specific or residuary, the income,

¹ *Parker v. Parker*, 5 Met. 134.

But where one gives by will absolutely to certain persons, and in certain contingencies "what may remain" after the death of such persons to others, the words "what may remain" can mean no more than what might survive ordinary use, wear, and decay. *Robertson v. Johnston*, 24 Ga. 102.

Where "all my worldly goods," etc., are given, "likewise my house and lot," this does not carry other real estate owned by the testator, but not otherwise mentioned or referred to. *Farish v. Cook*, 78 Mo. 212. But as between a specific devise of real estate and a

devise by way of residue not specified, see 31 N. J. Eq. 560.

² *Leighton v. Bailie*, 3 M. & K. 267; 2 Phill. 578; L. R. 14 Eq. 54; 1 Jarm. Wills, 775; *Wynne v. Wynne*, *supra*.

³ *Jacob's Appeal*, 140 Tenn. St. 268.

⁴ *Trevanion v. Vivian*, 5 Ves. 430; 2 Atk. 472; 1 Jarm. Wills, 652; *Hawkins Wills*, 43; 1 Wash. 53; *Fleming v. Bolling*, 3 Call, 75.

⁵ *Wade-Gery v. Handley*, 1 Ch. D. 653; 3 ib. 374.

⁶ *Bective v. Hodgson*, 10 H. L. 656.

⁷ *Wyndham v. Wyndham*, 3 Bro. C. C. 58; 4 ib. 144; *Hawkins Wills*, 44.

rents, and profits, which accrue during the suspense of vesting, descend as estate undisposed of; thus affording another instance in which the heir-at-law is favored in construction above the beneficiaries named in the will;¹ for the residuary legatee of personalty took what the law withheld in a corresponding case from the residuary devisee. Thus, if real estate is given to the use of an unborn person or in trust for him, and the will does not dispose of rents and profits in the meantime, they do not accumulate, but descend to the heir-at-law.²

But once more, if the testator's residuary real and personal estate are blended in one gift, though contingent and future in terms, the will applicable to personalty is presumed to have been intended for both, and intermediate rents and profits of real estate are carried as well as the income of the personal estate.³ And a residuary clause plainly expressed with respect to income will control, as it would appear, in any case.⁴ Where there is not a postponed or contingent gift of the residue, but a particular interest to commence *in futuro* in a fund already constituted, it would appear that intermediate income is not carried either of real or personal estate.⁵

§ 524. Residuary Bequest or Devise as to Gift of Proceeds of Sale, of Reversionary Interests, etc. — Gifts of the proceeds of real estate directed by the will to be sold, and gifts of money charged on land, like devises of land, do not, *prima facie*, fall into the residue, upon lapse, unless local legislation

¹ Genery v. Fitzgerald, Jac. 468; Hopkins v. Hopkins, Ca. t. Talb. 44; 1 Atk. 580 (where it is reported imperfectly) and cited Hawkins Wills, Appx. 1; 1 Jarm. Wills, 652; Hawkins Wills, 45.

² Hopkins v. Hopkins, *supra*. See § 503.

³ Genery v. Fitzgerald, Jac. 468; Ackers v. Phipps, 3 Cl. & F. 691; Rogers v. Ross, 4 Johns. Ch. 397; Hawkins Wills, 45; 1 Jarm. Wills, 653. But by this is meant a blending of real and

personal estate in the gift, and not a mere reference. Hodgson v. Bective, 1 H. & M. 397.

⁴ 1 Jarm. 652; Duffield v. Duffield, 3 Bli. N. S. 621. See Lord Brougham in Ackers v. Phipps, 6 Cl. & F. 691, criticised. Hawkins Wills, 46 & Appx. 1.

Stat. 1 Vict. c. 26, § 24, does not affect the question regarding intermediate income of residuary real estate. 1 Jarm. 653.

⁵ Weatherall v. Thornburgh, 8 Ch. D. 261; L. R. 20 Eq. 255.

changes the rule.¹ But this rule yields to a clear direction in the will which shows a contrary intent.² Where executors are directed to manage a certain farm and apply its revenues for the support and benefit of persons named, the latter have no vested right to the personal property on the farm.³

As to reversions, we may add, the modern rule which extends the scope of a devise to after-acquired lands, favors a more liberal treatment of such undisposed-of interests than formerly; and in general, a residuary devise or bequest will now, without distinction of real or personal estate, include every reversionary interest which remains undisposed of by the previous gifts in the will, whether the same be a reversion remaining after an interest created by the will or not.⁴ This rule does not take effect, however, where upon the whole will, it appears that the testator not only foresaw what would happen, but intended to dispose differently;⁵ and not to enter into a close comparison of discrepant authorities, we may leave each will to serve as its own criterion with this brief statement of modern maxims.

§ 525. **Devises and Bequests in Execution of Powers.**—To speak finally of devises or bequests as operating by way of appointment or in execution of some power which is vested in the testator, the earlier rule of construction has been that devises and bequests *prima facie* do not include property which was not the testator's own but of which he had a power to dispose; or, in other words, that an apparent gift of such property by the testament is not enough without clearer marks of his intention to execute the power in question.⁶ But a distinct description of the property embraced

¹ Amb. 643; 1 V. & B. 410; Arnold v. Chapman, 1 Ves. Sen. 108; Hawkins Wills, 47; *supra*, § 521.

² *Ib.*; Durour v. Motteux, 1 Ves. Sen. 320; Hephinstall v. Gott, 2 J. & H. 450.

³ Beirne v. Beirne, 33 W. Va. 663.

⁴ 1 Jarm. Wills, 654–663, and cases cited *passim*; Church v. Mundy, 12 Ves. 426; Glover v. Spendlove, 4 Bro. C. C. (Perkins's ed.) 338, note; Brigham

v. Shattuck, 10 Pick. 306; Brattle Square Church v. Grant, 3 Gray, 142; 4 Kent Com. 10; 3 Bradf. (N. Y.) 73; Youngs v. Youngs, 45 N. Y. 258; Harper v. Blean, 3 Watts, 473.

⁵ 3 Sandf. (N. Y.) 96; Johnson v. Stanton, 30 Conn. 301; Hawkins Wills, 47, note by Swords.

⁶ 6 Co. 17 b; Andrews v. Emmot, 2 Bro. C. C. 297; Hougham v. Sandys, 2

under the power is held to manifest sufficiently one's intention to execute it by the testamentary gift.¹ And if a testator should devise "all his lands" or "all his lands in A," and no real estate of his own answered the description, lands over which he had only a power might pass by the devise, rather than leave the whole disposition nugatory.²

§ 526. **The Same Subject.**—The Statute of Victoria shifts this presumption, or rather, so far as general powers are concerned; for a special power to appoint, or a power limited to a particular class of objects, is left as before. And the present rule of construction is accordingly that general devises of real estate and bequests of personal estate which are generally described will be presumed to include real or personal estate which the testator may have power to appoint generally, unless the will discloses a contrary intention.³ American statutes establish this rule with some local variations for this country; and the inclination now appears in our leading States to regard a general devise or bequest as operating *prima facie* in execution of whatever general power of disposal may be vested in the testator.⁴ Independently, indeed, of legislation, the general tendency in the United States has been to treat the presumption against intending to execute a power as one of no great force, whether with regard to a

Sim. 95; Hawkins Wills, 22; 1 Jarm. Wills, 676-682; 1 Atk. 559. Thus, a gift of "all my real estate" or "all my personal estate" will not include real or personal estate settled on the testator for life, with remainder as he should by deed or will appoint, etc.

¹ David's Trusts *Re*, 1 Johns. (Eng.) 495; Hawkins Wills, 23.

² 1 Jarm. Wills, 676; 1 Sugd. Pow. 916, 8th Ed.; Hawkins Wills, 24; Denn v. Roake, 6 Bing. 475; Standen v. Standen, 2 Ves. Jr. 589. The burden is on the party claiming an appointment by will to show that the testator had no other real estate when the will was made. Caldecott v. Johnson, 7 M. & Gr. 1047.

³ Stat. 1 Vict. c. 26, § 27, which, it is observed, speaks of general real and personal property which the testator has power to appoint "in any manner he may think proper." 1 Jarm. Wills, 682; Hawkins Wills, 27. A power is general under this act, though capable of being executed by will only. 24 Beav. 403; 3 Sm. & Gif. 303. And see Wilkinson *Re*, L. R. 4 Ch. 588; Boyes v. Cook, 14 Ch. D. 52; § 519, note.

⁴ Hawkins Wills, 27, and Sword's note; 1 Jarm. Wills, 676, and Bigelow's note; Amory v. Meredith, 7 Allen, 397; White v. Hicks, 33 N. Y. 383; 1 Bradf. (N. Y.) 114; Andrews v. Brumfield, 32 Miss. 108; 4 Kent Com. 334, 335.

devise or bequest ; since this might be overcome by some reference in the will to the power, or by some reference to the property which was subject to the power, or where the provision of the will could not otherwise take effect ; or wherever else the interpretation of the will under all the circumstances showed that the testator probably had it in view to execute the power.¹ But a mere residuary clause would not thus operate ;² and wherever the circumstances are open to inquiry in a doubtful case, the rule has been that the circumstances as existing when the will was made furnish the only criterion of intent, and that matters subsequent cannot be considered.³

§ 527. **Correction of Errors in describing Property.**—That moulding of language of which we have spoken,⁴ in order to further a testator's obvious intention, is preserved within prudent limits where a misdescription of what is given appears. Thus, for the sake of correcting what is manifestly a clerical error, and giving a sensible meaning to what would otherwise be absurd, "rent and personal" property has been read "real and personal."⁵ But to enlarge the phrase "the rest of my estate personal" to "the rest of my estate real and personal" is beyond the power of the court ;⁶ for this would be too much like making a will for the testator, a practice which might lead to intolerable abuse.

¹ See this subject ably discussed by Story, J., in *Blagge v. Miles*, 1 Story, 426; 4 Kent Com. 334, 335. The avowal in the will of an intent to execute a power is itself an execution of it without any express declaration. *Blake v. Hawkins*, 8 Otto, 315.

² *Amory v. Meredith*, 7 Allen, 397; *Blagge v. Miles*, *supra*; *Hawkins Wills*, 22.

³ *Boyes v. Cook*, 14 Ch. D. 52. Cf. *Funk v. Eggleston*, 92 Ill. 515.

Under the English act a will may operate as executing a power subsequently created. 1 Jarm. 676, Bigelow's note; *Boyes v. Cook*, *supra*. But not powers which do not come into exist-

ence while the testator was alive. 32 Beav. 31. We have already seen that wills executed under a power are deprived of all peculiarities of execution under the Statute of Victoria. *Supra*, § 299; Stat. 1 Vict. c. 26, § 10.

⁴ *Supra*, § 477.

⁵ *Baird v. Boucher*, 60 Miss. 326. And so in other cases of the kind provided the proper correction can be gathered from the context. *Northern's Estate Re*, 28 Ch. D. 153; c. 3, *post*.

⁶ *Graham v. Graham*, 23 W. Va. 36. Not even though the codicil recited that the testator had by his will disposed of his "estate real and personal," would the court make the change.

§ 528. **Object of Gift next to be considered.**—Next to the description of the gift itself in testamentary construction let us consider the person or persons who may be the object of the gift. Of personal incapacity to take under a will we have already discoursed in general: applying the doctrine to aliens, subscribing witnesses to the will, corporations, infants, insane persons, those under coverture, and the like, and have concluded most of these quite capable of becoming devisees and legatees.¹ Uncertainty, whether in the gift or the object of the gift, or the interest given, we shall consider at some length hereafter.² But let us now lay down some leading principles of construction applicable to the objects of gift by testament.

§ 529. **Gift to Children, etc., as a Class, how treated.**—And first, to speak of children, grandchildren, or other near relatives to some person of a given class. Our law, instead of supposing that a gift to objects thus brought together, should include naturally all of that class who may fulfil the description at any time, presumes rather that the testator intended the class to be ascertained upon his death, and neither earlier nor later. Hence a devise or bequest to the children of A, or of the testator, means *prima facie* to those of that class in existence at the testator's death, provided there be any at all to answer that description;³ and this rule extends to grandchildren, issue, brothers, nephews, and cousins.⁴ Nor is this presumption to be varied, whether an aggregate sum, like \$5000, be given to the class,—as \$5000, to the children (or grandchildren, or brothers, etc.) of A,—or a certain sum to each member of the class, as to the children (or grandchildren,

¹ *Supra*, §§ 23-27. But as to our modern policy unfavorable to subscribing witnesses in this respect, see further, § 357.

² C. 3, *post*.

³ *Viner v. Francis*, 2 Cox, 190; *Kay*, 638; *Hawkins Wills*, 68; *Jenkins v. Freyer*, 4 Paige, 47; *Downing v. Marshall*, 23 N. Y. 373; *Worcester v.*

Worcester, 101 Mass. 132; 2 Jarm. Wills, 154, 156, and Bigelow's note.

⁴ *Ib.*; *Baldwin v. Rogers*, 3 D. M. & G. 649; *Myers v. Myers*, 3 McCord Ch. 214; *State v. Raughley*, 1 Houst. 561; next note; *Smith v. Ashurst*, 34 Ala. 210; *Whall v. Converse*, 146 Mass. 345; § 563.

or brothers, etc.) of A, \$1000 each.¹ And such devise or bequest being to a fluctuating class of persons, the decease of any of them in the testator's lifetime will occasion no lapse in the disposition.² As we shall presently see, it is an immediate gift, or one to take effect in possession upon the testator's death, to which this maxim most properly applies.

This rule of construction as to the class of children or near relatives will apply even though words of additional description are used ;³ but if the description be such as narrows the gift to persons individually specified, and now living, — as in the gift to the children of A, namely, B, C, and D,⁴ — or, on the other hand, extends it to those of that class who may be born and begotten after the testator's death, — as in the gift "to all grandchildren now born or to be hereafter born during the lifetime of their respective parents,"⁵ — the manifest intendment of the will takes effect accordingly. But such exceptions only arise upon sensible grounds of inference, and a doubtful expression in one part of the will may be cleared or corrected by reference to what the instrument imports in other parts, and taken as a whole.⁶

In short the disposition is to regard all testamentary gifts to members of a class consisting of children, grandchildren, issue, brothers, nephews, or cousins, as intending *prima facie*

¹ Mann v. Thompson, Kay, 638. See also Chasmar v. Bucken, 37 N. J. Eq. 415; Robinson v. McDiarmid, 87 N.C. 455.

² 19 Barb. 494.

³ Examples are afforded in Hawkins Wills, 68, 69. As, if the gift be to the children "of the late A," a person dead at the date of the will, or to the "present born children of A." Leigh v. Leigh, 17 Beav. 605. And see Lee v. Pain, 4 Hare, 250; Paul v. Compton, 8 Ves. 375; Kay, 638.

⁴ Bain v. Lescher, 11 Sim. 397; Williams v. Neff, 52 Penn. St. 333; Morse v. Mason, 11 Allen, 36; L. R. 8 Eq. 52. So with other expressions which show that only relatives now living are contemplated. 2 Jarm. 155; Starling v.

Price, 16 Ohio St. 32. As, for instance, "to the five children of A." Smith's Trusts Re, 9 Ch. D. 117.

⁵ Scott v. Lord Scarborough, 1 Beav. 154.

⁶ So may the gift of A, the testator, be to children living at the decease of B; here the event of B's death might be before or after that of the testator. 2 Jarm. Wills, 158.

Limitation to "every other son or sons" is construed to exclude the eldest son. Locke v. Dunlop, 39 Ch. D. 387. "To be begotten" may, if so intended, refer to futurity. Ib.

Ordinarily a devise to sons by name is not a gift to a class. Church v. Church, 15 R. I. 138.

that class as it may exist at the testator's death, whether the effect be to reduce or extend the number of individual beneficiaries entitled to the fund.¹

§ 530. **The Same Subject.**—Notwithstanding the above rule, the judicial disposition is to let in subsequent issue and near relations of a class as generously as possible where the terms of the will justify a distinction. That distinction is found when the aggregate fund to the class is not distributable at once, and the question who shall compose the class may conveniently be postponed; or, in general, where the total amount of the gift does not depend upon the number of participants admitted to share it. Hence the English rule, confirmed by many American precedents, that the devise or bequest of a corpus or aggregate fund to children as a class, where the gift is not immediate, vests in all the children in existence at the testator's death, but so as to open and let in children who may come into existence afterwards at any time before the fund is distributable.² And this rule of construction, like the former one, extends its favor to grandchildren, issue, brothers, nephews, and cousins.³ Thus if property, real or personal, be given by will to A for life, and after his decease to the children of B, all of B's children who are alive at the death of the testator take vested interests, which may be partially divested to let in those after-born during the life of A; and so correspondingly, when the property is tied up from distribution for ten, fifteen, or twenty years; the effect of which is to make the fund distributable ultimately among the children (or grandchildren, brothers, etc., as the devise or bequest may be) who belong to the class at the

¹ *Schaffer v. Kettell*, 14 Allen, 528; *Hawkins Wills*, 69, 70, Sword's note. Thus, the idea of a class may be the leading one in the will, notwithstanding an enumeration of the persons who constituted the class at the date of its execution. *Springer v. Congleton*, 30 Ga. 977.

² *Devisme v. Mello*, 1 Bro. C. C. 537; 2 Madd. 129; *Hawkins Wills*, 71, 72, and Sword's note; 2 Jarm. Wills, 156-

167, and Bigelow's note; *Ayton v. Ayton*, 1 Cox, 327; *Moore v. Dimond*, 5 R. I. 129; *Hill v. Rockingham Bank*, 46 N. H. 270; *Hall v. Hall*, 123 Mass. 120; 1 McCart. 167; *Ross v. Drake*, 37 Penn. St. 375; 143 Mass. 237; 103 N. Y. 453; 72 Md. 67; *Tayloe v. Mosher*, 29 Md. 445; 37 Miss. 65; *Cooper v. Hepburn*, 15 Gratt. 558; 38 Ill. 206.

³ *Hawkins Wills*, 72; *Baldwin v. Rogers*, 3 D. M. & G. 649.

period of distribution, and the representatives of such as may have died meanwhile after surviving the testator.¹ All limitations future in enjoyment and not immediate appear to come within scope of this maxim.²

But this enlarged rule of construction does not operate where the postponement of distribution is that merely which the law fixes for convenience in paying debts, and winding up an estate in the usual process of settlement;³ nor where the aggregate gift is necessarily increased by the number of participants, instead of being a fund whose total amount is to be shared among more or fewer individuals of a class;⁴ nor to speak generally, when such a rule would not consist with a fair and just interpretation of the particular will.

§ 531. **The Same Subject.**—Another rule of presumption in this connection is, that where an aggregate fund is given to children as a class, and the share of each child is made payable on attaining a given age, or on marriage, the period of distribution is the time when the first child takes his share, and those born later are excluded;⁵ and the same holds good apparently of gifts to grandchildren, or to near relatives of the other classes already considered.⁶ This is a rule which supplies but does not conflict with our former maxims; the difference being that there we supposed all

¹ 10 Hare, 441.

² The rule of the text applies to gifts in the nature of powers or in execution of powers. *Hawkins Wills*, 72; 8 Ves. 375; 2 Jarm. 57, note. It extends also to the case where the testator does not create the life estate, but has only a reversionary interest expectant upon a previous life estate, of which his will disposes. *Hawkins Wills*, 74; 2 Jarm. 157; 15 Ves. 122. But as to the gift of a fund, part of which is reversionary, and part is not, see *Hawkins Wills*, 75, and cases cited. The rule applies where the prior estate determines by bankruptcy. *L. R.* 16 Eq. 590.

³ *Hagger v. Payne*, 23 Beav. 479. Hence might arise a distinction between

the case where postponement of one or two years took place under the general rules of settlement and distribution, and that where the testator expressly directs postponement for one or two years. 2 Strobh. Eq. 1.

⁴ *Hawkins Wills*, 73; *Ringrose v. Bramham*, 2 Cox, 384.

⁵ *Hawkins Wills*, 76; 2 Jarm. Wills, 160; *Andrews v. Partington*, 3 Bro. C. C. 403; 3 K. & J. 48; *Whitbread v. Lord St. John*, 10 Ves. 152; *Hubbard v. Lloyd*, 6 Cush. 523; *Tucker v. Bishop*, 16 N. Y. 404; 2 Rawle, 275; 5 Jones Eq. 44, 208; *Dawson v. Oliver-Massey*, 2 Ch. D. 753.

⁶ *Iredell v. Iredell*, 25 Beav. 485. See *L. R.* 12 Eq. 431, *per* Malins V.C.

shares payable at one and the same period of distribution, whether postponed or immediate, while here they become payable at different times; and the question is, who besides those living at the testator's death shall be embraced under the gift.

This rule of presumption appears to apply wherever the share of each one of the class is made to depend upon some event or alternative personal to the individual; as if the gift be made to A's children, the share of each to be paid on attaining twenty-one, or on death under that age leaving issue, or on marriage under that age; and the first one reaching twenty-one, or dying with issue, or marrying earlier, no after-born child will be let in.¹ Nor do words of mere futurity (such as "born, or to be born") affect this construction;² unless indeed the intent disclosed by the context should be plainly to the contrary; for if the testator should direct a distribution to await the majority of the youngest child, or some event personal to the latest member of the class, the postponement of payment would keep the class open correspondingly to let in the after-born,³ since the inconvenient delay which our presumption would remove cannot in such a case be avoided. Should any one of the class attain the age in the testator's lifetime, no after-born child usually can be let in at all.⁴

§ 532. **The Same Subject.**—If no members of the class described as children in a will are in existence at the testator's death, after-born children will be let in by inference

¹ Hawkins Wills, 76; 6 Ves. 344; Dawson v. Oliver-Massey, 2 Ch. D. 753; 2 Jarm. Wills, 162.

² 10 Ves. 152; Iredell v. Iredell, 25 Beav. 485.

³ Wainwaring v. Beevor, 8 Hare, 44; 3 D. M. G. 366; Armitage v. Williams, 27 Beav. 346.

⁴ Picken v. Matthews, 10 Ch. D. 264.

The construction of the foregoing rules is not often varied, even though it should lead to remoteness. 2 Jarm. Wills, 162. And see the English cases further compared, *ib.* 162–167. All pre-

sumptions as to members of a class yield of course to the context and general purpose of the will. If the testator gives to children (or grandchildren, etc.) "now living," he means those only who are *in esse* when the will is made; if to those living "when B dies," or upon the happening of some specified event, that event might happen before or after the testator's own decease, and establish the members of the class accordingly; while if to specified individuals of a class, those individuals, and no others, constitute the class.

even though the devise or bequest be immediate, rather than let the gift lapse altogether;¹ though not where this would violate the plain purpose of the will.²

As for words of futurity contained in the gift—as to the children “born and to be born,” “begotten and to be begotten,” “which A has or shall have”—the effect is not clearly settled. By some expression quite distinct, the testator may doubtless embrace such as happen to be born after the period of distribution;³ but English authorities appear disinclined to give this inconvenient effect of postponing to phrases like the foregoing;⁴ while in this country a disposition is frequently shown by the courts to let in after-born children wherever words of futurity are used.⁵

At all events, wherever “children” are to be ascertained at a given period under any of the foregoing rules of construction, the class will beneficially include a child then *en ventre* and born afterwards;⁶ for the potential existence of such a child brings it within the just and natural sense of such a gift. And under a parent’s will, more especially, all one’s own children, present-born or posthumous, may well be presumed, in American policy, as included.⁷

§ 533. **Words describing Object of Gift; “Children,” “Grandchildren.”**—Words descriptive of the objects of a gift, and

¹ Harris v. Lloyd, T. & R. 310; Hawkins Wills, 71; 2 Jarm. Wills, 167; Amb. 448.

² *Ib.*

³ Scott v. Lord Scarborough, 1 Beav. 154.

⁴ *Ib.*; 10 Ves. 154. The point is not perhaps quite settled. Hawkins Wills, 71, 74. And see 2 Jarm. Wills, 179–184, and cases cited. Mr. Jarman considers that, except where distribution would be postponed in consequence, the words “to be born,” or “to be begotten,” etc., in an immediate gift will extend it to all the children who shall ever come into existence. *Ib.*; 1 Mer. 654.

⁵ Hawkins Wills, 71, and Sword’s note; Yeaton v. Roberts, 8 Fost. 459; 3 Jones Eq. 491; Butterfield v. Haskins, 33 Me. 392. The practical inconven-

ience of postponing a distribution is avoided by taking refunding bonds from the existing distributees. Hawkins, 71, Sword’s note.

⁶ Tower v. Butts, 1 S. & Stu. 181; 2 H. Bl. 399; Jenkins v. Freyer, 4 Paige, 47; Hall v. Hancock, 15 Pick. 258; 2 Dev. & B. Eq. 308; Meigs, 149; Swift v. Duffield, 5 S. & R. 38; Hawkins Wills, 79; 2 Jarm. Wills, 185, Bigelow’s note; Starling v. Price, 16 Ohio St. 29; Crook v. Hall, L. R. 6 H. L. 265 (this last referring to illegitimate children). When the testator uses particular language, his intention shall govern, upon a due interpretation of the will. Emery Re, 3 Ch. D. 300; Starling v. Price, *supra*.

⁷ Meares v. Meares, 4 Ired. L. 192; *supra*, § 480.

more particularly of classes of objects, deserve our notice. And first, of "children," we may observe that the popular and legal sense of the word are in accord. A gift to the "children" of a person means, therefore, one's immediate offspring, and does not extend to "grandchildren";¹ while "grandchildren," in like manner, is confined to the immediate offspring of offspring, and does not embrace "great-grandchildren."² Such rules are but presumptive, however, and they yield of course to a contrary intention as gathered from the context; as where, for instance, such explanatory words as "legal heirs" or "who may be the surviving heirs of the body" are added or interchanged, and effect is best given to the whole disposition by supposing "children" synonymous with issue of descendants in general.³ And other words of more extended meaning than "children" or "grandchildren" simply may enlarge the usual scope of such language,⁴ as likewise the peculiar expression of the gift; as for instance to "children except A" (A being a grandchild);⁵ or, as some cases have held, where in another part of the will the word "child" is distinctly applied to a grandchild, or "grandchild" to a great-grandchild.⁶

Some have claimed that a ground is laid for construing "children" of A to include grandchildren or descendants where there was no child living at the date of the will.⁷ But

¹ Radcliffe v. Buckley, 10 Ves. 195; Clifford v. Koe, 5 App. Cas. 447; 3 De G. & J. 252; 1 Jarm. Wills, 147; Hawkins Wills, 85; Thomson v. Ludington, 104 Mass. 193; 3 Wall. jr. 32; Osgood v. Lovering, 33 Me. 469; 3 Comst. 540; Low v. Harmony, 72 N. Y. 408; 2 McCart. Ch. 198; Castner's Appeal, 88 Penn. St. 478; 19 Gratt. 327; Turner v. Withers, 23 Md. 18; U. S. Dig. 1st Series, "Wills," 1858; Pugh v. Pugh, 105 Ind. 552.

² Orford v. Churchill, 3 V. & B. 59; Hawkins, 85; 2 Jarm. 150; Hone v. Van Shaick, 3 Comst. 540; Dooling v. Hobbs, 5 Harring. 405.

³ Houghton v. Kendall, 7 Allen, 72;

Sorver v. Brendt, 10 Penn. St. 213; 73 Cal. 594.

⁴ Prowitt v. Rodman, 37 N. Y. 58; Hughes v. Hughes, 12 B. Mon. 115.

⁵ Pemberton v. Parke, 5 Binn. 606; 2 Duv. 334. In a few American States, the enlarged sense of "children," whether as including "grandchildren," or descendants in every degree, is favored by local legislation. Hawkins Wills, 85, Sword's note. "Children" is primarily a word of purchase, but it may be a word of limitation, and include descendants. 2 Jarm. 147, Bigelow's note.

⁶ Hussey v. Berkeley, 2 Ed. 194; Amb. 603.

⁷ 2 Jarm. Wills, 147; Hawkins Wills, 85; Smith *Re*, 35 Ch. D. 558.

if A was then living and capable of having children afterwards, the proper sense of the word is not changed,¹ though it might well be if A were dead when the will was made and the testator knew that grandchildren but no child survived him.² In other words, a strong argument arises in favor of the unusual and more extensive sense, when otherwise the testator's gift could never have had an object, and he must have known it.³ It would seem, however, more natural on the whole to give to "children," if not the precise and natural meaning, a loose one, as extending to issue or descendants collectively, with a right of representation, rather than "grandchildren" only. And the rule, in brief, is to take the word "children" in its literal sense unless the meaning is clearly a wider one in the particular case, or on the other hand the gift means nothing at all, circumstances outside the will not being taken into consideration. Where the testator names the children in his bequest to them, still less should the grandchild be admitted to share, whose parent died before the will was executed.⁴

§ 534. **The Same Subject.** — By "children," whether of the testator or some other person, a will is generally understood to denote all of the blood offspring, whether by one marriage or more.⁵ But children by affinity, such as a son's widow, are *prima facie* excluded;⁶ and so are step-children.⁷ Nor are illegitimate children presumed to be included; for public policy aids the constant interpretation of the courts that a gift to "children" means, on the face of it, to legitimate children only;⁸ into which class local legislation, however,

¹ Moor v. Raisbeck, 12 Sim. 123; 10 Ves. 198.

² Berry v. Berry, 3 Giff. 134; 2 Vern. 50.

³ Fenn v. Death, 23 Beav. 73; 2 Jarm. 148.

⁴ McMichael v. Pye, 75 Ga. 189.

⁵ 2 Jarm. Wills, 151; Isaac v. Hughes, L. R. 9 Eq. 191; 1 J. & H. 389; Barrington v. Tristram, 6 Ves. 345.

⁶ Hussey v. Berkeley, 2 Ed. 194; 2 Jarm. 151.

⁷ 3 Barb. Ch. 466, 475; Cutter v. Doughty, 23 Wend. 513; Sydnor v. Palmer, 29 Wis. 226; 108 Mass. 382; 1 Bradf. 252.

⁸ The rule of the text applies to gifts to "issue" and terms of relationship generally. See Kenebel v. Scrafton, 2 East, 530; Ellis v. Houstoun, 10 Ch. D. 236; Schoul. Dom. Rel. § 281; Wilkinson v. Adam, 1 V. & B. 422; Hawkins Wills, 80; *supra*, § 481; Appel v. Byers, 98 Penn. St. 479; 2 Jarm. Wills, 217;

may fairly bring those legitimized by the subsequent marriage of their parents.¹ Where illegitimacy results from the parent's honest error in contracting a marriage which turns out void, the status of children should be tenderly treated in construction, if possible.²

But context or surrounding circumstances may defeat, as before, whatever presumption would naturally have arisen; so that under a gift, children may be restrained to those of some particular marriage, on the one hand,³ and on the other, enlarged so as to include children by affinity, or step-children, or adopted or even illegitimate children;⁴ provided the context shows a corresponding intention in terms or leaves the alternative of a gift which never could have had an object. Of illegitimate children, whose stigma is certainly their misfortune, not their fault, whether born of parents who were

Kent *v.* Barker, 2 Gray, 535; 14 N. J. Eq. 159. "The question comes round to this," says Lord Eldon, "whether upon the contents of this will it is possible to say he could mean, at the time of making that will, any but illegitimate children." *Wilkinson v. Adam*, 1 V. & B. 461, 468; Hawkins, 80. But see as to the offspring of a marriage supposed legal, *Crook v. Hill*, L. R. Q. Ch. 311.

¹ This is an American and civil modification of the English common law, which is still stubborn against giving a status to those whose misfortune and the sin of their parents caused them to be born out of wedlock. *Schoul. Dom. Rel.* §§ 226, 227; *Miller's Appeal*, 52 Penn. St. 113.

Whether an adopted child would be included with "children" under a will, is a novel question growing out of a policy new to Anglo-Saxon institutions. It is held that such children are not *prima facie* intended. *Schafer v. Eneu*, 54 Penn. St. 304. *Cf.* *Johnson's Appeal*, 88 Penn. St. 346. And see *Russell v. Russell*, 84 Ala. 48.

But the criterion must be found in the language of the local statutes relative to adoption. See *Schoul. Dom. Rel.* 3d ed. § 232. One might perhaps

be decided a "child" under the will of the adopting parent more readily than where the gift was from some other testator. *Barnhizel v. Ferrell*, 47 Ind. 335. But see as to "heir of body," *Sewall v. Roberts*, 115 Mass. 262. And see *Ingram v. Southern*, L. R. 7 H. L. 408.

² See *Elliott v. Elliott*, 117 Ind. 380, where the testator's wife, who bore him children and lived with him until his death, was ignorant that he had abandoned a former wife abroad and left a child by her surviving him.

³ 2 Jarm. Wills, 152.

⁴ 2 Jarm. Wills, 217; *Drummond v. Leigh*, 30 Ch. D. 110; *Stewart v. Stewart*, 31 N. J. Eq. 398. Thus, where the gift is to the children of a person known to be dead at the date of the will. 2 Mer. 419; *Gill v. Shelley*, 2 R. & My. 336. Or *semble* to the children of a woman known to be beyond the age of child-bearing. But see 1 Sm. & G. 362. Or the gift is to "children," and there is but one legitimate child. *Gill v. Shelley*, *supra*. Or where the illegitimate children were identified by the gift as individuals entitled to share. 2 Hare, 282; *Hawkins' Wills*, 82, 83; 1 P. Wms. 529; 2 Jarm. Wills, 217.

guilty or innocent, we may add that courts at this day waver somewhat in applying the standard of construction; pitying, oftener than formerly, as they must, the lot of the outcast; and finding in the local policy, as they often may, some alleviation of the ancient hardships which attached to the bastard.¹

¹ The old rule is thus expressed: "Qui ex damnato coitu nascuntur, inter liberos non computantur." 3 Anst. 684; 2 Jarm. 217. But while loose and conjectural expressions afford no ground for admitting illegitimate children to gifts under a will, the true point of inquiry is whether, according to a true interpretation of the will, the testator meant to make such persons the objects of his bounty. 2 Jarm. 217; Schoul. Dom. Rel. § 281. Where the illegitimate child is sufficiently described or necessarily implied by the terms of the gift, such child will take. *Drummond v. Leigh*, 30 Ch. D. 110, commenting upon earlier English cases; *Wilkinson v. Adam*, 1 Ves. & B. 422; *Gardner v. Heyer*, 2 Paige, 11; 37 Ch. D. 695. Both in England and the United States an express gift to the unborn natural child of a woman then pregnant may take effect. *Crook v. Hill*, 3 Ch. D. 773; L. R. 6 H. L. 265; *Knye v. Moore*, 5 Harr. & J. 10; Schoul. Dom. Rel. § 281. But a gift to an illegitimate child or children not yet begotten is obnoxious to the policy of the law in this country, probably, as it is in England. *Holt v. Sindrey*, L. R. 7 Eq. 170; Schoul. Dom. Rel. § 281. And yet a provision for future illegitimate children *in esse* at testator's death is upheld in the latest English cases. 35 Ch. D. 728.

A common description of "children," however, does not, as a rule, let in those who are illegitimate and so reputed; for even if there were none legitimate when the will was made, the testator may be supposed to refer to the future birth of such; and public policy appears to support this construction, if possible, even though spurious offspring survive

the testator, and no legitimate child were born. *Durrant v. Friend*, 5 De G. & S. 343; *Hall &c*, 35 Ch. D. 551. Such is the disfavor of the law, that the mere absence of other objects does not let in a bastard. Mr. Jarman submits this test from the English cases, that in order to let in illegitimate children, under a gift to children, the will, as applied to the state of facts existing when it was made, must make it clear that legitimate children never could have taken, or that its terms, when so applied, could never have taken effect if confined to legitimate children. 2 Jarm. 234. But he admits reluctantly that this principle has not been invariably followed. *Ib*.

Extrinsic evidence is only admissible to show that illegitimate children have at the date of the instrument acquired the reputation of being legitimate, or that only illegitimate children fulfilled the description either when the will was made or when the testator died. 2 Jarm. 217, Bigelow's note; *Wilkinson v. Adam*, *supra*; *Gardner v. Heyer*, 2 Paige, 11. Some have laid it down that legitimacy being a question not of reputation, but of fact, a child afterwards discovered to be illegitimate, even though passing as legitimate when the will was made, cannot share in a gift to children. *Hawkins Wills*, 80. It seems fair, however, that, if the testator was neither guilty nor deceived about a child reputed as his own when the will was made, but the gift stands to the reputed child or children of another person, it ought not to fail of effect merely because such child or children prove afterwards illegitimate. See *Dane v. Walker*, 109 Mass. 179.

§ 535. "Issue," "Descendants," etc., as Objects of a Gift. — A gift to "issue," as a phrase of law, imports *prima facie* descendants of every degree from the common ancestor, including children and those more remote;¹ nor does the addition of the words "begotten by A" restrict this sense necessarily.² But where the "parent" of such issue is associated in the context, the language imports, rather than children alone were intended;³ and this narrower but more popular meaning may arise from other turns of expression defining the character of a gift;⁴ though the whole tenor of the will must determine each decision.⁵ A devise of real estate or a bequest of personalty appears to follow the same rule in this respect;⁶ for in a will "issue" is not so rigid an expression as it would be in a deed or grant.

As for "descendants," this word cannot in a will be construed to include any but lineal heirs, without clear indications in the will of a different purpose.⁷ But children, grandchildren and their children to the remotest degree are thus com-

¹ Davenport v. Hanbury, 3 Ves. 258; 19 Md. 197; Hawkins Wills, 86; 2 Jarm. 101, and Bigelow's note; 2 Wms. Exrs. 1196; 17 N. J. Eq. 475; Taylor v. Taylor, 63 Penn. St. 481; Maxwell v. Call, 2 Marsh. 119. An adopted child may be included as "issue." Sewall v. Roberts, 115 Mass. 262. An adopted child is not "issue." 64 N. H. 407. In a limitation to "issue or children," the word "issue" enlarges its scope. Hall v. Hall, 140 Mass. 267. An indefinite failure of issue is favored in construction in 119 Penn. St. 108.

² Evans v. Jones, 2 Coll. 516; 17 N. J. Eq. 475.

³ Sibley v. Perry, 7 Ves. 522; Barstow v. Goodwin, 2 Bradf. 416; Pruen v. Osborne, 11 Sim. 132; 1 Demarest, 217; 74 Penn. St. 173; King v. Savage, 121 Mass. 303; McPherson v. Snowdon, 19 Md. 197. The rule applies to either a devise or bequest. 19 Beav. 417; Hawkins, 88. The word "children" may be enlarged to "issue" where the

two terms are interchanged in a will. 2 Jarm. 107; Amb. 555; *supra*, § 533; 5 Munf. 440.

⁴ Fairchild v. Bushell, 32 Beav. 158; Duncan v. Harper, 4 S. C. 76; Palmer v. Dunham, 125 N. Y. 68.

⁵ Where a gift is to nephews, their "issue" to take the parent's legacy, "issue" means properly descendants taking by right of representation. 152 Mass. 67.

⁶ 2 Jarm. Wills, 102; Cook v. Cook, 2 Vern. 545; King v. Savage, 121 Mass. 303. A devise to "male issue" includes all male lineal descendants. Wistar v. Scott, 105 Penn. St. 200.

⁷ Baker v. Baker, 8 Gray, 101; Barstow v. Goodwin, 2 Bradf. 413; Van Beuren v. Dash, 30 N. Y. 393. Thus, a sister's child is not a "descendant" of the testator. 1 Bradf. 314. Nor collateral relatives generally. For a peculiar meaning under the Georgia statutes, see 25 Ga. 420.

prehended.¹ "Descendants" like "issue" is a very general word, but competent authorities pronounce it less flexible than "issue" in construction, requiring a stronger context to confine it to children.²

§ 536. **Collateral Relatives as Objects of a Gift.**—Now as to the words which denote collateral relatives as objects of a gift. By "brothers," "sisters," and even "nephews" or "nieces," is *prima facie* meant not those of the whole blood alone, but half-brothers and half-sisters, or children of a half-brother or half-sister;³ and so with the more remote kindred. For the policy of our law to admit general kindred of the whole-blood and half-blood equally to the inheritance when of the same degree is deeply graven in modern legislation.⁴

Notwithstanding the equivocal sense of *nepos* in Roman jurisprudence, "nephew" means in English law the son and "niece" the daughter of a brother or sister; and great-nephews or great-nieces are not embraced by the term.⁵ And as a gift is naturally to blood relatives, a nephew or niece by marriage, that is the nephew or niece of the testator's husband or wife, is *prima facie* excluded;⁶ as also would be the wives or widows of blood nephews.⁷ A similar presumption against great-grand-nephews is afforded where the gift is to "grand-nephews" simply.⁸

¹ Ambl. 397; Bouv. Dict. "Descendants"; 2 Jarm. Wills, 98-100.

The word "offspring" is *prima facie* synonymous with "issue," as a word of limitation and not of purchase. Allen v. Markle, 36 Penn. St. 117; 3 Drew. 7. See 29 Beav. 6, 18.

² Ralph v. Carrick, 11 Ch. D. 873.

³ Hawkins Wills, 86; Grieves v. Rawley, 10 Hare, 63; 2 Jarm. 154; 61 How. N. Y. Pr. 48; 2 Jones Eq. 202; 1 McCord, 406; 2 Yerg. 115.

⁴ See Cotton v. Scarancke, 1 Mad. 45. "Brethren," as a word of common gender, has been held to embrace both brothers and sisters. 1 Rich. Eq. 78. A devise to "brothers and sisters" excludes a niece, the issue of a sister who was dead at the date of the will. 11

Phila. 144. But as to property to be "equally divided among my brothers and sisters and their heirs," see 137 Mass. 409, where the right of representation was extended to the issue of such a sister. See also L. R. 11 Eq. 366, note.

⁵ Ambl. 514; Shelley v. Bryer, Jac. 207; Crook v. Whitley, 7 D. M. G. 490; 2 Yeates, 196; 2 Jarm. Wills, 152; 43 Ch. D. 569.

⁶ Hawkins Wills, 85; Smith v. Lidiard, 3 K. & J. 252; Green's Appeal, 42 Penn. St. 30; 39 Ch. D. 614.

⁷ Goddard v. Amory, 147 Mass. 71.

⁸ Waring v. Lee, 8 Beav. 247.

The rule of the text admits of the usual qualifications. Thus "nephews and nieces on both sides" may be construed to include those by marriage.

The word "cousins" may literally comprehend a large number of collateral kindred; for it denotes the son or daughter of the brother or sister of one's father or mother; so that one may have both paternal and maternal cousins of equal degree. For convenience it is presumed that a testamentary gift to "cousins" is meant to include first cousins only, if there be such,¹ and the nearer degree to that more remote. Nor does a gift to "first cousins," or cousins german (*i.e.* to the children of brothers or sisters) include first cousins once removed any more than a gift to "cousins" simply;² though a gift to "all the first and second cousins" would embrace all within the degree of second cousin, and hence take in equally the first cousins once removed and the first cousins twice removed.³

§ 537. "Relations," "Family," etc., as the Objects of a Gift. — The word "relations" or "relatives" has of itself no precise reference to legal succession, nor indeed any precise sense at all, since kindred to the remotest degree might thus be spoken of. But for convenience, and in order to prevent a gift from being void for uncertainty, it is commonly confined to those who would take under the statutes of distribution⁴ (or, if a devise, under the statutes of descent⁵) unless the

Frogley v. Phillips, 3 De G. F. & J. 466. And the same inference arises where the testator had no nephews or nieces of his blood, so that the gift would otherwise have meant nothing. *Sherratt v. Mountford*, L. R. 8 Ch. 928; L. R. 15 Eq. 305. So may the context of a will show that grand-nephews are included in a gift to nephews. 57 Conn. 24.

¹ *Stoddart v. Nelson*, 6 D. M. & G. 68; 31 Beav. 305; *Hawkins Wills*, 86; 2 Jarm. Wills, 152.

² *Sanderson v. Bayley*, 4 My. & Cr. 56. ³ *Hawkins Wills*, 86, 87; *Mayott v. Mayott*, 2 Bro. C. C. 125; 1 Sim. & Stu. 301; *Charge v. Goodyer*, 3 Russ. 140.

For the method of computing degrees of kindred, see chart at end of Schoul. Exrs. & Admsrs.

⁴ Those entitled either as next of kin or by representation to next of kin, may be thus included. *Rayner v. Mowbray*, 3 Bro. C. C. 234; 1 Bro. C. C. 31; *Drew v. Wakefield*, 54 Me. 291; *Hawkins Wills*, 103; *Varrell v. Wendell*, 20 N. H. 431; 2 Jarm. Wills, 121, and *Bigelow's* note; 3 Mer. 437; 11 Phila. 85. And see "poor relatives" thus construed as though "poor" were omitted. *M'Neile v. Galbraith*, 8 S. & R. 45; 2 Jarm. 126; *Widmore v. Woodroffe*, Amb. 636. As to "blood relatives," see *Cummings v. Cummings*, 146 Mass. 501.

⁵ *Thwaites v. Over*, 1 Taunt. 263; *M'Neile v. Barclay*, 11 S. & R. 103. The rule is more frequently applied to bequests, as in the preceding note.

will discloses a plain purpose to the contrary.¹ A gift to one's relatives, however, does not *prima facie* refer to husband, wife, or marriage connections, but to those only of one's own blood;² though relations of the half-blood may share.³ A gift to "those related to" a person or to "near relations" may be deemed synonymous with "relations" or "relatives."⁴ But the rules are adopted for convenience, where a definite class should be set apart as objects of one's bounty; and a charitable gift to relations by way of continuing a trust, is not thus limited; nor has a power to appoint property to relatives been always thus confined if it carried a right of selection.⁵ A gift to "nearest relations" prefers brothers to nephews or niece.⁶

"Family" in a will sometimes denotes the testator's children, and their respective children, and even the wife of a son, as forming one household, and all living together.⁷ But this is out of deference to what the testator appeared to have intended. The term "family" is indeed a flexible one, and may, under different circumstances, mean a man's household, consisting of himself, his wife, children, and servants; it may mean his wife and children, or his children, excluding the wife; or, if he has no wife and children, it may mean his brothers and sisters, or his next of kin; or it may mean the genealogical stock from which he sprung, since all these applications of

¹ See 3 Bradf. 382; 1 Bro. C. C. 32, 400; Ennis v. Pentz, 3 Bradf. 382; 2 Jarm. Wills, 124. On the other hand, the context may confirm the *prima facie* construction. 20 N. H. 431.

² 2 Jarm. Wills, 125, 154; Kimball v. Story, 108 Mass. 382; 1 Bro. C. C. 31; Ennis v. Pentz, 3 Bradf. 382; Cleaver v. Cleaver, 39 Wis. 96; Hibbert v. Hibbert, L. R. 18 Eq. 504; 83 Me. 197.

³ *Supra*, § 536; 2 Jarm. 124, 152.

⁴ Whitehorne v. Harris, 2 Ves. Sen. 527; Handley v. Wrightson, 60 Md. 198. But a gift to "nearest" relatives seems equivalent to next of kin, excluding the right of representation, but perhaps admitting all of the same degree in blood. Smith v. Campbell, 19 Ves.

⁵ Harding v. Glyn, 1 Atk. 469. Cf. Pope v. Whitcombe, 3 Mer. 689; 4 Russ. 297; Varrell v. Wendell, 20 N. H. 435. And see 2 Jarm. 127, 128.

It is held that the relations take equally *per capita*, the statute being employed only to define the objects and not the shares. Tiffin v. Longman, 15 Beav. 275. But cf. Hawkins Wills, 105, citing 9 H. L. C. 1. And see 2 Jarm. Wills, 122-124. The testator may have indicated plainly whether the relations shall share equally or not.

⁶ Locke v. Locke, 45 N. J. Eq. 97.

⁷ Bradlee v. Andrews, 137 Mass. 50,

the word and even others are found in common parlance.¹ It refers of course to two or more persons.² The description of "family" may sometimes be so vague that the gift will fail altogether,³ and, on the other hand, be upheld like a gift to "relations."⁴ A bequest to "A's family" or to the "family of A" is most readily supposed to denote A's children, if he have any, or his next of kin;⁵ and a devise would refer correspondingly to "heirs," or "heirs of the body";⁶ while a gift to "family" of personalty and realty blended may designate next of kin as to the one kind, and heir as to the other.⁷ A devise of land to "A and his family" would consequently seem to import an estate tail at common law;⁸ and so, too, a bequest of personalty to "A and his family" would operate as a gift to A for life, with remainder to A's children,⁹ though this awkward construction is sometimes avoided by regarding the will as intending rather a joint tenancy between A and such of his children as survive the testator.¹⁰

§ 538. **Taking per Capita or per Stirpes.**—That distinction so familiar in the distribution of the estates of decedents, namely between *per capita* and *per stirpes*, comes now into view. Where all the persons entitled to share stand in the same degree of kin to the decedent, as, for instance, all grandchildren, and claim directly from him in their own right, and not through some intermediate relation, they take *per capita*; that is, in equal shares, or share and share alike. But where

¹ Blackwell v. Bull, 1 Keen, 181, *per curiam*; 2 Jarm. Wills, 90. A will may employ the word "family" in the sense of including an illegitimate child. L. R. 6 Ch. 597; *supra*, § 534. And see, as to illegitimate relatives, Jodrell *Re*, 44 Ch. D. 590; aff. App. Cas. (1891) 304. But a child of H, born after the testator's death, is not included under a devise to "H and family." 64 N. H. 526.

² 55 Conn. 239.

³ See Tolson v. Tolson, 10 Gill & J. 159; 2 Jarm. Wills, 90, 91; Harper v. Phelps, 21 Conn. 259; L. R. 6 P. C. 381.

⁴ *Supra*, p. 572; 9 Ves. 319; 2 Jarm. 95.

⁵ Hawk. Wills, 89; Gregory v. Smith, 9 Hare, 708; Barnes v. Patch, 8 Ves. 604; Heck v. Clippenger, 5 Penn. St. 388; 3 W. Va. 610.

⁶ Hob. 29; Wright v. Atkyns, 17 Ves. 255; Coop. 122; 2 Jarm. Wills, 91.

⁷ White v. Briggs, 15 Sim. 17.

⁸ 29 Beav. 657.

⁹ 26 Beav. 195, 485, *per Romilly*, M. R. See same *c.*, *post*.

¹⁰ Parkinson's Trusts, 1 Sim. N. S. 242. And see Corlass *Re*, 1 Ch. D. 460.

they are of different degrees of kindred, as in the case of grandchildren and great-grandchildren, the latter representing some deceased grandchild like A, they take *per stirpes*, or according to the stock they represent; and hence the great-grandchild of A may take his dead parent's share, while other great-grandchildren are excluded because their parent B, C, or D is living. When persons take as individuals they are said to take *per capita*; when by right of representation, *per stirpes*.¹

If this distinction is embodied in the laws which distribute an intestate estate, a testator may expressly contemplate it in his will or the law presume it for him in his silence. One may thus exclude the legal inference of representation by naming the grandchild of a deceased child with children or specified individuals as all to take "share and share alike," or by some similar expression; or he may on the other hand give representation its natural force silently or by saying that such grandchild shall "take his parent's share," "take by right of representation," and the like. The statute policy of the jurisdiction must determine how far the rule *per stirpes* should be carried, when the assent of the testator is to be inferred from the language or the silence of his will. But aided by this policy our courts raise certain presumptions.

Thus under a gift to "descendants" (taking the usual broad scope of this word²) equally, though children and grandchildren, or great-grandchildren be embraced, some with a living parent, and others with none, the issue of every degree are entitled to an equal share, simply because the will has so directed.³ And the same holds true of a gift to one's "issue" in the broad sense of this word as synonymous with descendants, or nearly so.⁴ On the other hand, if the gift is directed to be in the statutory proportions,⁵ or if it expresses the idea of a distribution *per stirpes* among specified persons, or some one's "descendants," or "issue," as when it

¹ 2 Black. Com. 218; 3 Ves. 257; Bouv. Dict.; 2 Jarm. Wills, 101, 106, 112.

² *Supra*, § 535.

³ Butler v. Stratton, 3 Bro. C. C. 367; 2 Jarm. 100; 2 Jur. N. S. 443.

⁴ *Supra*, § 535; Davenport v. Hanbury, 3 Ves. 257; 2 Jarm. Wills, 101.

⁵ Smith v. Pepper, 27 Beav. 86.

directs expressly that any child of a deceased member of the class shall take his parent's share by right of representation,¹ the will should operate accordingly. As to real estate, corresponding maxims would seem logically to apply; but we must remember that the statute policy of descent coincides not wholly with that of distribution, and the old will which favors the heir may still hamper the local construction.² The due interpretation of a will requires sometimes that personalty should be divided *per capita*, and the realty *per stirpes*.³

In general, legatees will take *per capita* rather than *per stirpes*, or *vice versa*, where it is clearly apparent what the testator intended.⁴

§ 539. **The Same Subject.**—Personal representatives, or the next of kin, under the Statute of Distributions, take naturally *per capita* by the policy of English law; hence an express provision that the "personal representatives" of a child or children, shall take *per stirpes* and not *per capita* has been taken to indicate that the testator used "personal representatives" in the sense of "descendants."⁵ "Heirs," on the other hand, or "bodily heirs," "heirs and assigns," and such like expressions, signify *prima facie* that the gift was to take effect *per stirpes*.⁶

But all such construction gives way if another intent be detected; and detached words afford no constant test of what the testator really intended. As where one gives "equally," or "share and share alike," to his lawful "heirs";⁷ though once more "equally," or "share and share alike," might fitly refer in a given case to a division among a class as *per*

¹ Robinson v. Shepherd, 32 Beav. 665; 10 Jur. N. S. 53; 2 Jarm. 100.

² See 2 Jarm. Wills, 102.

³ Hayes v. King, 37 N. J. Eq. 1.

⁴ See Verplanck Re, 91 N. Y. 439.

⁵ Atherton v. Crowther, 19 Beav. 448.

⁶ Balcom v. Haynes, 14 Allen, 204; Osburn's Appeal, 104 Penn. St. 637;

Cook v. Catlin, 25 Conn. 387; Swin-

burne Re, 16 R. I. 208; 2 Jones Eq. 377. "Heirs or legal representatives" is a flexible expression. See 27 Penn. St. 55; 118 Ill. 403.

⁷ 2 Jarm. Wills, 195, Bigelow's note; Puryear v. Edmonson, 4 Heisk. 43; Tuttle v. Puitt, 68 N. C. 543; Richards v. Miller, 62 Ill. 417; Allen v. Allen, 13 S. C. 512.

stirpes.¹ On the other hand, where the gift is to those who would take in case of intestacy, or to "next of kin" in classes, leaving it doubtful what should be their due proportions, it is held in the United States the safer rule to construe "next of kin" in close conformity with the Statute of Distributions, so as to give representation and the division *per stirpes* its usual effect under the local policy.² These presumptions do not seem to vary in force whether the heirs, next of kin, etc., referred to are those of the testator himself, or of some other person living at the date of the will.³

§ 540. **The Same Subject.** — As for a gift to be shared by the children of two or more persons, whether expressed to the children of A and B, etc., or to the children of A and the children of B, the devise or bequest means *prima facie* that these children shall take *per capita* and not *per stirpes*.⁴ And thus is it also with a devise or bequest to children and grandchildren, or to brothers and sisters and nephews and nieces, as though intended to be equally divided among them, the objects of bounty being specified by name.⁵ Indeed, wherever as a class the beneficiaries are individually named, or are designated by their relationship to some ancestor living at the date of a will, whether to the testator or some one else,⁶ they share *per capita*, by natural inference, and not *per stirpes*;⁷ and especially if they are all of the same degree.⁷ Persons, moreover, who would otherwise have taken *per*

¹ King v. Savage, 121 Mass. 303; Lyon v. Acker, 33 Conn. 222; Risk's Appeal, 52 Penn. St. 271; 16 R. I. 208.

² King v. Savage, *supra*; Harris's Estate, 74 Penn. St. 452; Lackland v. Downing, 11 B. Mon. 34; Fisher v. Skillman, 3 C. E. Green, 236; Hawkins Wills, 115. Cf. 9 Rich. Eq. 471; 2 Dev. Eq. 306.

³ 12 Bush. 369.

⁴ 2 Jarm. Wills, 194, and Bigelow's note; 2 Vern. 705; Lincoln v. Pelham, 10 Ves. 116; Luzar v. Harman, 1 Cox, 250; Farmer v. Kimball, 46 N. H. 435; Hill v. Bowers, 120 Mass. 135; Thompson v. Young, 25 Md. 461; Post v.

Herbert, 27 N. J. Eq. 540; Young's Appeal, 83 Penn. St. 59; Hoxton v. Griffith, 18 Gratt. 574; Hawkins Wills, 113. The codicil taken with the will may evince such intention. Atwood v. Geiger, 69 Ga. 498.

⁵ Kean v. Roe, 2 Harring. 103; 2 Jones Eq. 202.

⁶ 2 Jarm. 194, Bigelow's note; Crawford v. Redus, 54 Miss. 700; Young's Appeal, *supra*.

⁷ Where all the next of kin are children of brothers and sisters, they take *per capita*. Wagner v. Sharp, 33 N. J. Eq. 520.

stirpes, as A and the children of B, or the members of a specified class and their children, may, from the collective description under which all are embraced in the will, be presumed to take *per capita* and equally.¹

But this construction bends readily as in other cases to indications in the will of a contrary purpose, if such be the fairer conclusion from the whole context.² And the instances where the presumption has thus given way are very many. As in the mode of appropriating income, or a failing share before the capital fund is to be distributed.³ Or by force of such words as "heirs,"⁴ or "respectively."⁵ Or where the gift to children, nephews, etc., is merely substitutional, as in the case of a bequest not collectively to A and B "and their children," but to A and B "or their children."⁶ Or where "children of A" as a class are named with other individual beneficiaries.⁷ And generally where the other dispositions in the will lead easily to a contrary interpretation.⁸ For all this indicates that the idea of bestowing by representation and *per stirpes* and not equally, of making a gift to respective classes, of treating children as standing in the place of their parents, was in the testator's mind when he made the will.⁹ And where by one clause of the will a distribution of prop-

¹ Blackler v. Webb, 2 P. Wms. 383; Butler v. Stratton, 3 Bro. C. C. 367; 12 Sim. 167, 184; Payne v. Webb, L. R. 19 Eq. 26; 1 Jarm. Wills, 194; Pitney v. Brown, 44 Ill. 363; 38 N. J. Eq. 348; Dible's Estate, 81 *Penn. St. 279; Hawkins Wills, 113; Scott v. Terry, 37 Miss. 64; Fisher v. Skillman, 3 C. E. Green, 231; 118 Ill. 403; Senger v. Senger, 81 Va. 687; 72 Ga. 825; 64 N. H. 328.

A devise to "all my grandchildren in equal shares" entitles them to take *per capita* and not *per stirpes*. 142 Mass. 240. But other expressions indicate an apparent intention to the contrary. 19 N. C. 207; 113 N. Y. 366; 118 Ind. 23; Lockwood's Appeal, 55 Conn. 157.

² 2 Jarm. Wills, 195, and Bigelow's note; Alder v. Beal, 11 Gill & J. 123; cases *infra*; Hawkins Wills, 113. It

will yield "to a very faint glimpse" of a different intention in the content, says Jarman. *Ib*.

³ Brett v. Horton, 4 Beav. 239; Hawkins v. Hammerton, 16 Sim. 410; 1 Mer. 358.

⁴ *Supra*, § 539.

⁵ Davis v. Bennett, 4 De G. F. & J. 327. But not if equal division among them, share and share alike, is directed. 13 S. C. 512.

⁶ 2 Jarm. Wills, 195, 196; Davis v. Bennett, *supra*; Price v. Lockley, 6 Beav. 180.

⁷ Ferrer v. Pyne, 81 N. Y. 281; 83 N. Y. 505; 30 N. J. Eq. 595.

⁸ Adams v. Adams, 2 Jones Eq. 217; 136 Penn. St. 222.

⁹ Hawkins Wills, 114, and Sword's note; 6 Ired. Eq. 487; 7 Rich. Eq. 132; Walker v. Griffin, 11 Wheat. 375.

erty *per capita* is directed, and by a subsequent contradictory clause a distribution *per stirpes*, the latter may be held to control.¹ Furthermore, the policy of our local statutes of distributions will be found to favor the right of representation more fully as to lineal than collateral kindred.²

§ 541. **The Same Subject.** — Occasion has sometimes arisen for applying this distinction of *per capita* and *per stirpes* where the devise or bequest is to tenants for life with a remainder over. Here the conclusion, where no plainer signs of a testator's intent appear, must depend much upon whether the tenants for life take with or without a right of survivorship. If the gift is to several for life in common, and afterwards to the children of some only of these life tenants, these children may readily be presumed to take *per capita*.³ But otherwise a gift to A and B for life as tenants in common devolves *prima facie* on the children *per stirpes*, so as to keep each share dependent upon a death, separate and distinct.⁴ But if the life tenants take as joint tenants, or in any other manner which gives the right of survivorship, and but one period of distributing the fund, it may be presumed that with one class of objects, they were intended to take *per capita*.⁵ And so, too, even without this survivorship, where the general distribution among children is postponed until after the death of the last surviving tenant for life.⁶ In short, a disposition to give to children *per capita* appears restrained only by the inconvenience of identifying them together as distributees, when shares go over separately and at different times as each life tenant dies, and there might be more children to take one share than another unless the *per stirpes* rule were

¹ Carter v. Lowell, 76 Me. 342; *supra*, § 478. And see Campbell's Trusts, 31 Ch. D. 685; aff. 33 Ch. D. 98.

The cases which apply the construction *per capita* or *per stirpes* are very numerous, and need not be cited at length. See cases already cited *supra*. Local statutes may be found extending the favor of the law to the rule of *per stirpes* or representation of an ancestor's share. 15 R. I. 171; 46 Ohio St. 307; 81 Me. 268; 84 Mich. 567.

² See Woodward v. James, 115 N. Y. 346.

³ Swan v. Holmes, 19 Beav. 471.

⁴ 2 Jarm. Wills, 197, and cases cited; Wills v. Wills, L. R. 20 Eq. 342; Cowp. 777; Arrow v. Mellish, 1 De G. & S. 355; Hawkins Wills, 114, 115.

⁵ Malcolm v. Martin, 3 Bro. C. C. 50; Taaffe v. Conmee, 10 H. L. Cas. 64; Hawkins Wills, 115; 18 Beav. 590.

⁶ Nockolds v. Locke, 3 K. & J. 6.

applied.¹ Nor can even this inconvenience override a testator's manifest intent.²

§ 542. "Heirs" and "Next of Kin," as used in Bequests.—To enter more fully upon descriptions of the interest taken under a will, let us first consider the meaning of the words "heirs" and "next of kin" as applicable to a testator's personal estate. English text-writers distinguished between four classes of persons who may take personalty beneficially by way of succession: (1) the "next of kin" proper, as computed according to the degrees of the civil law; (2) the "next of kin according to the Statute of Distributions," which includes those who take by representation to next of kin; (3) the wife, who is entitled to a share under the Statute of Distributions, but is not one of the next of kin; (4) the husband, who was said to take the personalty of his wife by virtue of his matrimonial right, and not under the Statute of Distributions at all.³ So technical a division, however, between "next of kin" within and without the Statute of Distributions, appears unsuitable to the temper of the age in this country at least. The old Statute of Distributions of Charles II., though at the basis of our American jurisprudence, by no means fixes the prevailing rights of kindred in the systems of the several States; but measuring these rights constantly by local statute, we have come to use "next of kin" in a sense relative to such local legislation as may apply, with little regard to the original statute, and much less to meaning which the civilians attached to the term. And as for the rights of widow or surviving husband in a decedent's estate, we consult our written law, whether styled a Statute of Distributions, or bearing any other title. All this is important, when we consider that what a testator probably intended by his choice of words is the main point at issue.

The word "heirs" in a bequest of personal property, referring to the heirs of A, means, then, *prima facie* the

¹ Cases *supra*; 2 Jarm. 197, 198. D. 380; Smith v. Streatfield, 1 Mer.

² Ca. t. Talb. 27; Abrey v. Newman, 359; Hawkins Wills, 115.

16 Beav. 431; Swabey v. Goldie, 1 Ch. ³ 2 Steph. Com. 197, 209; Hawkins Wills, 91. Cf. Schoul. Exrs. §§ 498-502.

persons who would be entitled to that property had A died intestate; and this whether A is the testator himself, or some one else named in the will, and whether the gift is substitutional (as in the bequest to "A or his heirs"¹) or original (as to the "heirs of A").² In other words, heirs is not "next of kin" according to the civil computation, but the statutory next of kin or distributees, those who for the purpose of succession stand in a position analogous to that occupied by heirs, as to real estate, under the law of descent.³ This presumption favors testamentary intent, notwithstanding the word "heirs" is technical and inappropriate to personal estate.

Hence English cases have included a widow in the bequest out of deference to the original Statute of Distributions of Charles II.;⁴ though not a surviving husband.⁵ But a just regard for our local law of distributions in this country may well exclude both husband and wife from taking as "heir"; and the local law, if not clearly waived by the testator himself, ought to conclude the point, whether favorably or unfavorably to a surviving spouse. In American acceptance, the husband is neither heir nor next of kin to his wife, generally speaking; nor is the widow heir or next of kin to her husband.⁶ And at all events where personalty is given to

¹ Hawkins Wills, 92; Gittings v. McDermott, 2 My. & K. 69; 2 Jarm. Wills, 79; Doody v. Higgins, 9 Hare, 32; Newton's Trusts, L. R. 4 Eq. 173.

Such a bequest is construed as a gift by way of substitution to the heirs, in the event of A's death before the period of distribution. *Ib.* A gift "to A, and if he dies before me, to his heirs," conforms also to the rule of the text. 1 J. & W. 388. The word "forever" does not alter the construction. Doody v. Higgins, *supra*.

² Hawkins Wills, 92, and Sword's note; Jacobs v. Jacobs, 16 Beav. 557; Porter's Trusts *Re*, 4 K. & J. 188; Houghton v. Kendall, 7 Allen, 76; Wright v. Trustees, 1 Hoff. Ch. 212; Ashton's Estate, 134 Penn. St. 390; 136 Penn. St. 153; Ferguson v. Stewart, 14 Ohio,

140; Nelson v. Blue, 63 N. C. 660; Ward v. Saunders, 3 Sneed, 391; 2 Duv. 296; Evans v. Godbold, 6 Rich. Eq. 26; Sweet v. Dutton, 109 Mass. 589; 146 Mass. 345. The meaning of the word "heirs" when used in a will may be determined from the context.

³ *Ib.*; Hascall v. Cox, 49 Mich. 435.

⁴ Hawkins Wills, 92; 2 K. & J. 738; Porter's Trusts *Re*, 4 K. & J. 188.

⁵ Lord v. Bourne, 63 Me. 368; Richardson v. Martin, 55 N. H. 45; Tillman v. Davis, 95 N. Y. 17. Gibbons v. Fairlamb, 26 Penn. St. 217, holds that the word "heir" or "representative" does not necessarily exclude the husband, if he can be included by the law of the country.

⁶ See 106 Penn. St. 176, 216. But

the widow for life, and after her death to the testator's "heirs," the widow cannot be treated as an heir;¹ nor in any other case where the context shows that she is regarded differently.

The word "heirs" is flexible on the whole, and may denote "next of kin" or "heirs at law," according to the nature of the property given,² as well as next of kin in one sense or another. But what this word signifies is in all cases a question of intention; and if other expressions in the will and the whole context clearly indicate what the testator meant, and that his meaning was not according to the usual sense of "heirs" as above, that intention must prevail.³ And whether in accordance with the presumption or against it, we often find "heirs" construed by a court where the sense permits as though it were written "children."⁴ For "issue," "children," "heirs" are constantly interchanged in testaments. And some other meaning of the word may have been adopted by the person whose will is to be interpreted.⁵

§ 543. **The Same Subject.** — As for the expression, "next of kin," when employed in a bequest of personalty, the English precedents, after much conflict of authority, concluded it to import *prima facie* by itself a gift by way of joint tenancy to the nearest blood relations of the *propositus* in equal degree under the civil computation;⁶ and this is pursu-

local statute may change this rule. *Lincoln v. Aldrich*, 149 Mass. 368.

¹ *Henderson v. Henderson*, 1 Jones L. 221.

² *Ingram v. Smith*, 1 Head, 411; *Sweet v. Dutton*, 109 Mass. 589; 146 Mass. 424. As to "heir" in a devise of real estate, see §§ 545-553, *post*, at more length.

³ *Den v. Zabriskie*, 15 N. J. L. 404; 3 Rich. Eq. 156; *Love v. Buchanan*, 40 Miss. 758; *Williamson v. Williamson*, 18 B. Mon. 329; 53 Md. 550.

⁴ *Bowers v. Porter*, 4 Pick. 198; *Eby v. Eby*, 5 Penn. St. 461; 6 Ala. 431; 2 Desau. 94; 25 S. C. 289.

⁵ *Collier v. Collier*, 3 Ohio St. 369; *Hayne v. Irvine*, 25 S. C. 289; 117

Ind. 308. "Heirs-at-law of A" does not embrace readily a child whom A has adopted under the statute since. *Wyeth v. Stone*, 144 Mass. 441.

A gift to the "heirs of E, deceased," will include the children of E's son, who died after the will was executed, but before the testator. 41 N. J. Eq. 414. Where a conversion from real to personal estate has taken place, agreeably to the will, the technical sense of "heirs" yields. *Howell v. Ackerman* (Ky.), 1889.

⁶ *Elmesley v. Young*, 2 My. & K. 780; *Withy v. Mangles*, 4 Beav. 358; s.c., 10 Cl. & F. 215; *Hawkins Wills*, 97; 2 Jarm. Wills, 108-111. American precedents may be found of the same

ance of the technical distinction already pointed out.¹ For to carry the gift to "next of kin, according to the Statute of Distributions," one ought to express himself to that effect, or at least imply such a purpose, as in giving to those who would have taken had he died intestate;² in which case the right of representation and *per stirpes* will take effect, and legatees take as tenants in common.³ The above rule of construction would put the father of a testator on the same footing as his own children, where he gives simply to his "next of kin," and among children ignore utterly the right of representation.⁴ How contrary this is to one's natural intent we need not argue; and in the midst of these refinements of construction, Lord Campbell admits frankly that "the law has by some bad luck got into a strange state."⁵ The true intent of the will should prevail against any perversion of words from their usual meaning; and American authorities will often best further this intent by presuming "next of kin" to mean, as it does in popular usage, those whom public policy and legislation recognize as such, and not computing them by the antiquated and unjust rule of the canonists.

At all events, under a gift to own "next of kin," whether simply or under the Statute, the widow takes nothing, nor of

purport. 5 Jones Eq. 236; 5 Ired Eq. 382; Redmond v. Burroughs, 63 N. C. 242; Hoff. Ch. 202; Swasey v. Jaques, 114 Mass. 135; 150 Mass. 231.

"It is certainly difficult to distinguish between the expressions 'next of kin,' 'nearest of kin,' 'nearest kindred,' and 'nearest blood relations,' and primarily the words indicate the nearest degree of consanguinity, and they are perhaps more frequently used in this sense than any other." Field, J., in Swasey v. Jaques, 144 Mass. 135, 138. By the will as here applied, the brother, not unjustly, took to the exclusion of nephews.

¹ *Supra*, § 542.

² Hawkins Wills, 97-99; Garrick v. Camden, 14 Ves. 372; 2 Jarm. Wills, 109.

³ Bullock v. Downes, 9 H. L. Ca. 1; L. R. 6 Eq. 601. Some nice distinc-

tions necessarily arise under this English rule. See 2 Jarm. 109. Thus, a gift to the "next of kin" of a married woman "as if she had died unmarried," is treated as too doubtful a reference to the statute. Halton v. Foster, L. R. 3 Ch. 505. In a recent case, a bequest "to the heirs or next of kin of A deceased" was held to be a gift to a class, and not alternative: namely, to the next of kin of A according to the statute. Thompson's Trusts *Re*, 9 Ch. D. 607.

Gifts expressly to "next of kin" on the mother's side or on the father's side, or exclusive of some person or persons, or preferring one line of kindred to another, are sometimes construed. 2 Jarm. 110.

⁴ See Schoul. Exrs. §§ 498-502.

⁵ Withy v. Mangles, 10 Cl. & F. 215, *per* Lord Campbell.

course does a surviving husband ; for married persons are not "next of kin" to one another.¹

§ 544. "Representatives," "Executors and Administrators," etc., as used in Bequests. — The term "representative," sometimes called a "personal representative," or a "legal personal representative," has an equivocal meaning when associated with a deceased person's estate. Executors or administrators are most naturally designated by such words. Hence a bequest of personal estate to the "representatives," or the "personal" or "legal personal representatives" of any one, whether of the testator or some one else designated, is taken to intend *prima facie* one's executors or administrators.² But the weakness of such a presumption consists in making those who, properly speaking, should represent some decedent for legal purposes, represent him beneficially to the detriment of his statutory next of kin ; or, again, of making the deceased testator or intestate represented a legatee in effect. And, accordingly, courts have often avoided that construction by considering the statutory heirs or next of kin as "representatives" in a layman's looser sense, and under that description fulfilling the policy of the law by making the bequest operate as though the giver had died intestate in respect of such property.³ And in other instances they have presumed that the gift, whether to the personal representative, or to executors and administrators, meant that the legal representative should take the property in his fiduciary character

¹ *Garrick v. Camden*, 14 Ves. 372; *Storer v. Wheatley*, 1 Penn. St. 506; *Irvin's Appeal*, 106 Penn. St. 176.

² *Hawkins Wills*, 107; *Saberton v. Skeels*, 1 R. & My. 587; *King v. Cleveland*, 4 De G. & J. 477; 2 Drew, 230; *Ware Re*, 45 Ch. D. 269.

A wife who makes her will and dies soon after her husband, may thus return the property she received under his will to his estate. *Halsey v. Paterson*, 37 N. J. Eq. 445.

³ *Bridge v. Abbot*, 3 Bro. C. C. 224;

Cotton v. Cotton, 2 Beav. 67; 2 Jarm. Wills, 111, and Bigelow's note; *Horner Re*, 37 Ch. D. 695; *Davies v. Davies*, 55 Conn. 319; 43 N. J. Eq. 95; *Brokaw v. Hudson*, 27 N. J. Eq. 135; 3 Edw. Ch. 270; *Gibbons v. Fairlamb*, 26 Penn. St. 217; *Thompson v. Young*, 25 Md. 450; 12 Rich. Eq. 260. English analogy would thus include a widow as a beneficial "representative," though not a surviving husband. 4 De G. & J. 477; *supra*, § 542. And see 2 Demarest, 112.

only, and not as the rightful owner.¹ The context may, by associating such words as "next,"² or by directing how the trust fund shall be paid, shared, or enjoyed,³ or by some other reference which brings out the purpose more plainly, conclude that executors or administrators should not take in one character or another.

"Executors and administrators," or "legal representatives" are terms quite naturally used as mere words of limitation. For in the common case of a gift to "A and his executors or administrators," or to "A and his legal representatives," A takes the absolute interest, being manifestly the only object of the testator's bounty.⁴ But a gift may be made to A's "representatives" by way of substitution for A in case of his death;⁵ or to such of a class as may be living at a certain time, and "the executors or administrators of such of them as shall then be dead";⁶ or to A's "executors or administrators," or "representatives" simply without any suggestion of A's death.⁷ In all such cases, the idea of a beneficial gift to next of kin is necessarily excluded. But whether the property shall vest in the representative for his own benefit is another thing. Such a construction appears once to have prevailed in England; but the later and more trustworthy cases condemned it as quite the reverse of what testators naturally intend; and an express enactment of William IV. confirms the impolicy of mingling the legal and fiduciary characters.⁸ Apart from legislation, it is true, an executor or administrator, a legal representative, may be made a legatee if the testator so directs explicitly;⁹ though one

¹ See *Wigram, V. C. in Holloway v. Clarkson*, 2 Hare, 523.

² *Stockdale v. Nicholson*, L. R. 4 Eq. 359.

³ 2 Jarm. 113; 3 Ves. 146; 19 Beav. 448; *Hawkins Wills*, 108; 7 Hare, 225; *Atherton v. Crowther*, 19 Beav. 448.

⁴ *Appleton v. Rowley*, L. R. 8 Eq. 139; 2 Jarm. 115.

⁵ *Price v. Strange*, 6 Madd. 159; *Taylor v. Beverley*, 1 Coll. 108.

⁶ *Seymour's Trusts*, John. 472.

⁷ *Trethewy v. Helyar*, 4 Ch. D. 53; 2 Jarm. 118.

⁸ 2 Jarm. Wills, 118, 119; 1 Anstr. 128, disapproved in *Long v. Blackall*, 3 Ves. 483; Act. 1 Wm. IV. c. 40. Though the original gift were immediate, and the legatee died in the testator's lifetime, or was dead at the date of the will, the presumption should be against a beneficial enjoyment by the representative. 17 Beav. 471; *Trethewy v. Helyar*, 4 Ch. D. 53.

⁹ See *Wallis v. Taylor*, 8 Sim. 241,

seldom would be selected as an object of bounty for the sake of the office and not the man who filled it; but the general purport of such gifts is *prima facie* that the representative constituted by the court takes the gift not beneficially but as part of the estate which he represents.¹ And once more a gift may be made to "my executor A," which is really to A personally, the word "executor" being simply descriptive of him.²

§ 545. **Heir how far favored when Realty is undisposed of.**—Wherever real estate is not beneficially disposed of under the will, whether this results from the silence of that instrument, or from its failure of operation because of the predecease, disclaimer, or incapacity of the devisee named, the rule is, that the beneficial interest therein devolves upon the heir or heirs at law; in other words, it goes according as the local statute may have cast the inheritance in case of intestacy. And since the statute rules for personalty and realty, for next of kin and the technical heirs, for distribution and descent, do not coincide, this distinction by the species of property should be borne in mind.³

Hence is derived the familiar doctrine of a resulting trust in favor of the heir upon the true interpretation of a devise. And consistently with this doctrine, the heir at law takes the benefit not only of a general and total but of a particular and partial failure of disposition under the will: so that where real estate is devised simply upon trust for a particular purpose, as for paying specified debts, or with a direction that A shall have the rents and profits for life or some other specified term, whatever beneficial interest remains unexhausted, or unapplied, results to the heir. This resulting trust in favor of the inheritance sweeps in whatever beneficial interest touching real estate or its proceeds the devise, from one cause or another, fails to carry off into other chan-

where the bequest was to executors, etc., "for their own use absolutely and forever."

¹ 2 Jarm. Wills, 120; Holloway v. Clarkson, 2 Hare, 523.

² 6 Dem. Sur. 166.

³ 1 Jarm. Wills, 565, and Bigelow's

note; Cro. El. 243: Starkey v. Brooks, 1 P. Wms. 390; Robinson v. Taylor, 2 Bro. C. C. 589; Lewin Trusts, 124; Wright v. Methodist Church, 1 Hoff. 203; Tilghman Re, 5 Whart. 44; King v. Mitchell, 8 Pet. 326.

nels.¹ And so jealously have courts of chancery upheld the rights of the heir to the landed surplus undisposed of, even to the last remnant, that the order to blend personal and real estate in a common fund and other equivocal directions of a testator can hardly change this interpretation of a will.²

Where the devise bears the stamp of a trust and plainly was not for the devisee's own benefit—as the scope of the intention manifested by the instrument itself must ultimately determine, whether by introducing such words as “upon trust” or without any express words of trust whatever—this resulting trust in favor of the heir arises.³ Negative evidence of intent cannot exclude him, for the trust results not because the testator so willed it, but because he declared no positive trust to the contrary which can operate to dispose of the whole fund.⁴ But where the purpose obviously shown by the will was to give the interest in the land beyond the scope of the declared or undeclared trust to the devisee beneficially instead of the heir, the latter's rights must yield accordingly.⁵

§ 546. **The Same Subject.**—Thus far we assume that the testator has made no express residuary devise of real estate by his will. As between a residuary devisee under the will, however, and the heir at law, it may be necessary to determine which of the two shall take the realty undisposed of in preference to the other. Here the modern rule, as we have seen, which tends to assimilate dispositions of real and of personal property in principle, favors the residuary devisee, if there be one, above the heir, and carries to him *prima facie* all real estate or interest in real estate comprised in any void or lapsed devise.⁶ And yet, whether, a specific devise fail-

¹ Cases *supra*; 1 Jarm. Wills, 565.

² Collins v. Wakeman, 2 Ves. Jr. 683; Ackroyd v. Smithson, 1 Bro. C. C. 503; Lewin Trusts, 122.

The rule of the text operates where the testator's real intention cannot be ascertained; but a devise will be reduced to a certainty and upheld if possible. Jackson v. Kip, 2 Paine, 366.

³ 1 Jarm. Wills, 566–583, Bigelow's notes, and cases cited; Lewin Trusts,

118–120; Dawson v. Clarke, 18 Ves. 254; Gloucester v. Wood, 1 H. L. Cas. 272; Easterbrooks v. Tillinghast, 5 Gray, 17.

⁴ 2 Vern. 425; 3 Ves. 211. A legacy to the heir is a circumstance which may be considered in this connection, but it is not enough to prevent him from taking a trust fund. 3 P. Wms. 193.

⁵ Lewin Trusts, 118–120; 1 Jarm. 566.

⁶ *Supra*, § 521; Act 1 Vict. c. 26, §

ing, the land passes by the residuary clause or goes to the heir, is after all a question of intent under the particular will.¹

§ 547. **Meaning of "Heirs" as applied to Real Estate; or where Real and Personal are blended.** — The word "heir" in a will has still a technical meaning, namely, the heir at law of real estate;² and if there is nothing in the context to justify a different construction, the heir at law must take the property as *persona designata*; or, in the broader sense of to-day, heirs are those persons upon whom, under the policy of the jurisdiction where the land lies, the inheritance is cast in case the owner dies intestate. This presumption avails in strictness only where real estate is devised; for we have already seen that "heirs" in a popular sense *prima facie* denotes next of kin under the statute of distributions, so far as a gift of personalty is concerned.³

If, therefore, property real and personal be blended under a gift expressed to "heirs," our modern construction fitly regards the testator's probable purpose as to each element of the disposition. There are cases in which both elements are mingled so completely in one fund on the face of the instrument that only one sense of "heirs" seems to fit the case, and that one the technical or real estate sense;⁴ or possibly as synonymous with "heir apparent" or with some peculiar or inaccurate meaning attached.⁵ But where real and personal estate are given together and not so inseparably blended, "heir" is better treated as an elastic term; and in such cases the intention intimated is rather, that "heirs" was used in a twofold meaning, namely, heir at law as regarded the real estate, and next of kin as concerning the

25; *Green v. Dunn*, 20 Beav. 6; *Tongue v. Nutwell*, 13 Md. 415; *Thayer v. Wellington*, 9 Allen, 283; 2 Jarm. Wills, 646-651.

¹ *Bosley v. Bosley*, 14 How. 390.

² 2 Jarm. Wills, 61; *Mounsey v. Blamire*, 4 Russ. 384; Co. Lit. 10 a.

Under the English statute 3 & 4 Will. IV. c. 106, § 3, the heir takes the realty

in the character of devisee, and not as formerly by descent. 2 Jarm. 61. In the United States each State defines the inheritance by its own statute.

³ *Supra*, § 542.

⁴ See *Smith v. Butcher*, 10 Ch. D. 113, as cited in 25 Ch. D. 214.

⁵ *Carne v. Roche*, 7 Bing. 226; 2 Jarm. Wills, 71.

personalty.¹ For where the word "heir" is used to denote succession or substitution, it may in our day be well understood to mean such person or persons as would legally succeed to the property according to its nature or quality.² In all cases, however, the testator's intention, if manifest, must govern. And where the gift is directly to the heirs of a person as a substantive gift to them of something from which their ancestor was altogether excluded, this element of succession or substitution is wanting, and the word "heirs" may more properly receive its strict common-law meaning.³

§ 548. **The Same Subject.** — Where, then, a testator devises real estate to his heir simply, or to his heir at law or his right heirs, the person or persons who may answer this description at the testator's death are presumably entitled; nor matters it that the devise expressed "heir" in the singular, while the statute heirs, in the given instance, are plural: for "heir" is a collective term and may stand for any number of persons who happen to fulfil the description.⁴ Furthermore, it is a common-law rule of ancient standing that a devise simply expressed to heirs in the plural vests an estate in fee simple without any words of limitation added.⁵

What we have said of a devise expressed to a testator's own heir applies equally where land is devised to the heir of some other person designated in the will. But no one is the heir of a living person;⁶ and hence a gift expressed to the "heirs" of one who proves still alive could not in strictness vest, especially as evidence *dehors* the will, to show that the testator thereby intended "heirs" in some special sense,

¹ Wingfield *v.* Wingfield, 9 Ch. D. 658; Keay *v.* Boulton, 25 Ch. D. 212 and cases cited; De Beauvoir *v.* De Beauvoir, 3 H. L. C. 524; Sweet *v.* Dutton, 109 Mass. 589; 152 Mass. 457.

² Mounsey *v.* Blamire, 4 Russ. 384, *per* Sir John Leach, M. R. And see what Lord Chancellor Cottenham says in Withy *v.* Mangles, 10 Cl. & F. 215, 253, of "heirship according to the

nature of the property." See also 2 Jarm. Wills, 81, 82.

That "heir-at-law" is not an adopted child, see Wyeth *v.* Stone, 144 Mass. 441; *supra*, § 542.

³ Fabens *v.* Fabens, 141 Mass. 395.

⁴ Mounsey *v.* Blamire, 4 Russ. 384.

⁵ Skinn. 206; 2 Jarm. Wills, 61, 62.

⁶ "Nemo est hæres viventis" is the familiar maxim. 2 Jarm. Wills, 71.

would be inadmissible. Courts, however, lay hold of descriptive words, or other indications in the will that the testator regarded the person as living and meant the gift in a secondary sense to the children or some other relatives of that person as a class reckoned at the testator's death, and by this interpretation of intent save the gift.¹

The presumptive and proper meaning of "heir" yields, of course, to the context and probable meaning of any will in controversy taken as a whole. Thus, a testator may have intended the person described to become entitled under the gift in his ancestor's lifetime; as, for example, where lands are devised to heirs male "now living."² Again, he may have used "heir at law" in the sense of "eldest son,"³ or "heir" as synonymous with "heir apparent,"⁴ or with express reference to "children."⁵ If the will plainly devises to A B, identifying the person, no inaccurate description of A B as my "heir," or by similar words, will defeat the gift; for it may be said either that "heir" was used in a special sense, or that the words of misdescription should be stricken out as surplusage, leaving the devise to stand unimpaired.⁶

§ 549. **Devise of Lands, Estate, etc., in Fee.**—We have shown that by the old law a devise of lands in fee without words of limitation passed *prima facie* an estate for life only, though in many instances subversive no doubt of the testator's real intention.⁷ We have also seen that modern legislation has reversed the rule from a settled conviction of its impolicy.⁸ It was always admitted that a single gift to

¹ 2 Jarm. Wills, 61, Bigelow's note; *Heard v. Horton*, 1 Denio, 168; *Carne v. Roche*, 7 Bing. 226; 2 W. Bl. 1010; 1 Dev. & B. Eq. 393.

The gift is not saved by thus inferring the secondary meaning of "heir," if limited by the will so as to give in effect a different estate from what "heir" in the primary sense denotes. *Campbell v. Rawdon*, 18 N. Y. 412. See comment in 2 Jarm. Wills, 61, Bigelow's note.

² *James v. Richardson*, Ld. Raym. 330; 2 Jarm. 72; *Morton v. Barrett*, 22 Me. 257.

³ *Carne v. Roche*, 7 Bing. 226.

⁴ 2 Jarm. Wills, 72, 73; *Goodright v. White*, 2 W. Bl. 1010. And see 2 Jarm. 74, 75.

⁵ *Haverstick's Appeal*, 103 Penn. St. 394; *Hinton v. Milburn*, 23 W. Va. 166; *Barton v. Tuttle*, 62 N. H. 558.

⁶ *Supra*, § 516; *Hob. 33, 34*; 1 Vent. 381; 2 Jarm. Wills, 75-77.

⁷ *Supra*, § 483.

⁸ *Supra*, § 485. See also 4 Kent Com. 5-8; *Ib. 535, 538*; 2 Jarm. Wills, 267, 268, Bigelow's notes, where many authorities are cited.

A carried personal property; and a testator naturally supposed that if he gave his land simply, the same result would follow; and hence the practical mischief wrought by that artificial interpretation of earlier times, which the courts tolerated as long as they did from the dread of unsettling old titles in real estate, though avoiding it when they could find some plausible ground, equally artificial, to rest upon. With the English Statute of Victoria, and enactments of similar scope in almost every American State, we may now consider it a well-settled principle that in a devise of lands neither "heirs" nor any other word or words of inheritance or limitation need be superadded in order to pass a fee; but the simple devise to A shall be construed to mean a devise in fee (or, at least, all the testator's interest in the property), unless the will clearly imports a different intention.¹ And as for a devise of "estate," this word passed a fee even under the old rule.²

In order to meet the older requirements of our law, and for the sake at all times of leaving one's intention clear of doubt, a devise in fee simple has properly been drawn up, so as to give the land to "A and his heirs," or to "A, his heirs, and assigns forever";³ but numerous other expressions are sustained by the courts; as, for example, "to A forever," "to A and his assigns forever," "to A and his successors," "to A in fee simple," "to A and his house," "to A and his family," "to A or his heirs."⁴ So has the inheritance in fee passed where incidents of *jus dispendi* were annexed to the gift; as, to A "to give and sell," "to be at his discretion," "to give away at his death to whom he pleases," "to do what he will with it," and the like.⁵ A devise with "all right and title" or

¹ 4 Kent Com. 7, 8, 535 and numerous cases cited; 2 Jarm. Wills, 268, Bigelow's note. "I give my lands," "all the rest, residue and remainder of my lands," "all my lands," etc., are good expressions at this day for giving an absolute interest to the devisee.

² *Supra*, § 484; 2 Jarm. 276.

³ 2 Jarm. Wills, 274.

⁴ *Ib.* and cases cited; Co. Lit. 9 b;

8 Vin. Ab. 206; Read v. Snell, 2 Atk. 645; Wright v. Atkyns, 17 Ves. 261. A devise simply to "A and his assigns" imports a life estate only. Co. Lit. 9 b. See the expression, "in fee-simple for life," construed in McAllister v. Gale, 11 Rich. 509. A devise "to A absolutely" will pass the fee. Oswald v. Kopp, 26 Penn. St. 516.

⁵ 2 Jarm. Wills, 274, 275; Jennings

"all interest" annexed imports a fee.¹ It is not upon formal modes of expression, however, that the force of the devise turns; for whenever, expressly or by implication, the will shows the purpose to give one's property in fee simple, that purpose shall prevail,² and so conversely where a lesser estate was intended.³

§ 550. **The Same Subject.**—Since "estate" may denote the *quantum* of interest as well as the *corpus* of the property, the word has been given a free scope in passing the inheritance wherever its interpretation in a will may consist with such an intent. As where the testator devises "all my estate," all the remainder (or the residue, or the rest) "of my estate, real and personal," "all my estate, real, personal, and mixed," or even "my estate," or "my estates" at or in a certain place;⁴ though not if "estate" is used as descriptive of chattel interests, so as to exclude a freehold.⁵ That the "estate" described locality or the *corpus* of the property, does not hinder this liberal presumption, that a fee by way of interest was also intended;⁶ but the word should appear in the very terms of gift, and be what is called an operative word, and not occur by way of mere description or with some disconnected sense in a different part of the will.⁷ The operation of the word "estate" may doubtless be restrained by the context, and any presumption that a fee was given is overcome when the whole will discloses an opposite purpose.⁸

v. Conboy, 73 N. Y. 230; 8 Conn. 277; 1 Harr. 25; Purcell *v. Wilson*, 4 Gratt. 16; 17 Pick. 436.

¹ 5 T. R. 292; Sharp *v. Sharp*, 6 Bing. 230.

² 2 Jarm. 275; 4 Kent Com. 435, 436. That a devise of rents, profits, etc., will carry the inheritance, see *supra*, § 503.

³ As to whether a devise to a person "to be freely possessed and enjoyed" passes more than a life estate, cf. *Drewry v. Barron*, 11 East, 220; *Lloyd v. Jackson*, L. R. 1 Q. B. 571; *Wright v. Denn*, 10 Wheat. 204.

⁴ *Supra*, § 484; 2 Jarm. Wills, 276, and Bigelow's note; Hawkins Wills,

131; *Jackson v. Delancey*, 13 Johns. 537; *Archer v. Deneal*, 9 Pet. 585; 25 Penn. St. 142; 107 Mass. 590.

⁵ See *Shaw, C. J.*, in *Godfrey v. Humphrey*, 18 Pick. 539.

⁶ *Supra*, § 484; 2 Jarm. 277.

⁷ "The principle is, that where the word 'estate' is an operative word, it passes the fee, and to try whether it be operative or not the test is to strike it out of the will." Heath, J., in *Randall v. Tuchin*, 6 Taunt. 410. Yet "said estate" as referring to what precedes is treated as operative. See 2 Jarm. 280, 281; 6 Taunt. 317.

⁸ 2 Jarm. 282.

"Property" is a word which may, like "estate," operate to pass the whole inheritance: thus, "a gift of all my property, both real and personal," will presumably carry a fee in the land.¹ Under the words "remainder" or "reversion" a remainder in fee or a reversion in fee was carried under the old rule;² but the words "residue" and "remainder," as commonly used in residuary clauses, did not operate with similar force according to English precedent,³ though in this country, as well as under the modern rule, a fee of the residue should generally be presumed.⁴

§ 551. **Customary Heir; Heirs Male of the Body, etc.** — The common-law heir, or heir general, was, for centuries from the Norman Conquest, favored above the customary heir, so that if gavelkind lands, which by the old Saxon tenure admitted sons equally to the inheritance, were devised to the heirs of any person without an estate in the ancestor, the eldest son alone took the fee simple.⁵

Lord Coke laid down another rule still more exclusively in favor of the heir general or heir-at-law, where one devised to "heirs male of the body" of a person;⁶ which rule, however, is now repudiated, so that (as regards estates tail, at least) a devise thus expressed does not require the heir male of the

¹ 2 Jarm. Wills, 283, and Bigelow's note; *Nicholls v. Butcher*, 18 Ves. 193; *Leland v. Adams*, 9 Gray, 171; *Coltsmann v. Coltsmann*, L. R. 3 H. L. 121; *Rossetter v. Simmons*, 6 S. & R. 452. And see *supra*, § 484, as to the effect of other words in sanctioning a fee; also 2 Jarm. Wills, 285.

² 2 Ves. 48; 1 Ld. Raym. 187; 2 Jarm. 284.

³ 2 Jarm. 285; *Denn v. Mellor*, 57 R. 558.

⁴ *Parker v. Parker*, 5 Met. 134.

The abolition of the technical rule which favored the heir at the cost of the devisee wherever a devise was made without words of limitation is generally commended. "Upon the whole," observes Mr. Jarman, "the enlargement of the operation of an indefinite devise

may be regarded as one of the most salutary of the new canons of interpretation which have emanated from the legislature." 2 Jarm. Wills, 287.

Where one holding a fee simple in an undivided half of certain premises devises to A "my undivided half" of such premises, this gives A a fee simple, although no words of inheritance are used. *Waterman v. Greene*, 12 R. I. 483. A testator may give one-third or some other proportion of all his property so as to vest that undivided interest absolutely in his devisee. *Roseboom v. Roseboom*, 81 N. Y. 356.

⁵ Bouv. Dict. "Gavelkind"; Co. Lit. 10 a; *Roberts v. Dixwell*, 1 Atk. 607; 2 Sm. & G. 90; 2 Jarm. Wills, 78.

⁶ Co. Lit. 246.

body taking by purchase to be heir general.¹ This later construction conforms to the general presumption that "heirs male of the body" or "issue male" properly means descendants in the male line only; that is, males claiming through males.² And while the expression "heirs male" forever (instead of "heirs" forever) in a deed would be superfluous and inaccurate, it is a rule with respect to a devise that this shall be construed to mean "heirs male of the body." It follows that a devise to A and his heirs male forever vests in A an estate in tail male;³ or, if a will gives land to the testator's "son, A, and his oldest male heir forever," A takes an estate tail;⁴ and in a devise to A for life, with remainder to his "heirs by" a particular wife, "heirs by" is equivalent to "heirs of the body by" that wife.⁵

In short, an estate tail may frequently be created under a devise by words less precise and formal than in a conveyance;⁶ and upon the theory that the testator intended some qualification upon the inheritance, that intention operates accordingly.

§ 552. **The Same Subject.**—The rule of Archer's Case deserves notice in this connection. This rule is, in substance, that where an estate is limited by devise to A for life, with remainder to the heir male of his body (in the singular number), and to the heirs male of the body of such heir male, A has an estate for life only, while the heir male of his body takes an estate in tail male as purchaser.⁷ To the same effect

¹ *Wills v. Palmer*, 5 Burr. 2615; *N. H.* 499; *McIntyre v. Ramsey*, 23 Penn. St. 317.

² *Co. Lit.* 25 a; *Bernal v. Bernal*, 3 M. & Cr. 559.

³ 3 Salk. 336; 2 Jarm. Wills, 325; *Co. Lit.* 27 a; *Lindsey v. Colyear*, 11 East, 548; *Hawkins Wills*, 172, 173.

⁴ *Cuffee v. Milk*, 10 Met. 366. An "estate tail," or "estate in fee-tail," is an inheritable estate which will descend to certain classes of heirs. It is properly created by the words "heirs of the body," of, etc. 1 Washb. Real Prop. 51, 66. But *cf.* *Dennett v. Dennett*, 43

7 H. L. Cas. 35.

⁶ 2 Jarm. Wills, 325. The expression "lawful heirs" standing alone will not be construed heirs of the body. But "heirs lawfully begotten" have in a devise been treated as creating an estate tail. See 2 Jarm. 325; 7 Ell. & B. 295; 17 Beav. 254.

⁷ *Archer's Case*, 1 Rep. 66; 2 Jarm. Wills, 327; *Hawkins Wills*, 174; *Willis v. Hiscox*, 4 My. & Cr. 197.

are other cases,¹ which thus distinguish between superadded words of inheritance in a devise to the heir male, as here, and a simple devise to A for life, with remainder to the heir male; for in the latter instance an estate tail in A would be created, and the next heir male would take no estate by purchase, the words being construed as words of limitation.²

So, too, if the devise be to A for life, with remainder to the heir male of his body and the heirs or heirs of the body of such heir male, A takes for life only, and the heir male of his body takes an estate in remainder in fee or in tail.³

§ 553. **Estates Tail in a Devise; "Heirs"; Shelley's Case.**—To speak more generally of estates tail. The rule in Shelley's Case has been so inflexibly asserted against all indications of what a testator really meant, that many pronounce it a rule of law and not of construction, like the rules which forbid perpetuity and mortmain;⁴ but the doctrine seems to have hardened by degrees, through the reluctance of the courts to disturb landed titles. The rule of Shelley's Case is simply that where real estate is devised to a person, and there is a limitation besides, either mediate or immediate, to his heirs or the heirs of his body, "heirs" must be taken as a word not of purchase, but of limitation only, for the marking out the quality of the estate, and that the ancestor takes the whole estate comprised in the gift. If, therefore, the limitation be to the heirs of his body, he takes a fee tail, and if to his heirs general, a fee simple.⁵ This doctrine has

¹ Ibid.; *Sisson v. Seabury*, 1 Sumn. 235; *Doe v. Laming*, 2 Burr. 1100; *Canedy v. Haskins*, 13 Met. 389.

² 1 Com. 289; *Chambers v. Taylor*, 2 My. & Cr. 387.

³ *Willis v. Hiscox*, 4 My. & Cr. 197; *Chamberlayne v. Chamberlayne*, 6 E. & B. 625.

⁴ *Hawkins Wills*, Preface; 2 Jarm. Wills, 332; 4 Kent Com. 245; 1 Prest. Estates, 263.

⁵ *Hawkins Wills*, 184, 185; *Perrin v. Blake*, 4 Burr. 2579; *Jesson v. Wright*, 2 Bligh, 1; *Fetherstone v. Fetherstone*,

3 Cl. & F. 67; 2 Jarm. Wills, 333, and Bigelow's note; *Curtis v. Longstreth*, 44 Penn. St. 302; *Jordan v. Adams*, 9 C. B. N. S. 483; 17 Wall. 639. Shelley's Case, 1 Rep. 93, does not directly involve this principle, but discusses it at much length; later cases, however, confirmed the rule. In a valuable note to 2 Jarm. Wills, 332, Mr. Bigelow states that this same doctrine had been laid down as early as 1325, or more than two and a half centuries before Shelley's Case. And see *Daniel v. Whartenby*, 17 Wall. 642.

prevailed since the days of Coke, and probably much earlier, in all transfers of real estate whether by conveyance or by last will and testament. It applies as well whether the limitation be expressed to heirs at once or after some intervening estate. And the bearing of the English cases, at least, appears to be to convert inexorably the entire devise to the ancestor's favor under this rule, no matter by what incident superadded to the technical expression, or by what express and emphatic declaration the testator shows that he meant to give an estate for life merely, and not one of inheritance to the first donee; and despite any and all attempts which the will may manifest on its face to qualify or abridge the estate in fee or in tail which derives its virtue from words inflexible in meaning.¹ No interposing of trustees to preserve contingent remainders, no introduction of powers of jointuring or of liberty to commit waste, can vary the construction.² So, on the other side, with reference to the estate thus expressed to the heirs, language or incidents utterly inconsistent with an estate by descent, as that the heirs shall take as tenants in common, or according to the ancestor's appointment, or share and share alike, or without regard to sex or seniority of age, all must give way to the stern and unyielding rule of *Shelley's Case*.³ In other words, the force of the express words of inheritance overpowers all distributive directions with which these words may happen to be coupled, and such inconsistent directions may be rejected as repugnant to the devise.

Yet, while in the course of time substance has here so frozen into the form, it seems to have been conceded all the while in principle that whenever it is perfectly clear in a given case, from other language, that the testator used the technical words not according to the rule but contrary to it,

¹ See Cockburn, C. J., in *Jordan v. v. Harrison*, 16 Q. B. D. 85; *Jesson v. Adams, supra*. *Wright*, 2 Bligh, 1; *Sisson v. Seabury*, 1 Sumn. 235; *Criswell's Appeal*, 41

² *Poole v. Poole*, 3 B. & P. 627.

³ *Jordan v. Adams, supra*. And see *Perrin v. Blake*, and other cases *supra*; *Penn. St.* 288; 5 R. I. 273; *Daniel v. Whartenby*, 17 Wall. 639, *per Mr. Justice Swayne*.
Hawkins Wills, 184, 185; *Richardson*

his intention will prevail against any mere technical expression. As where he says in effect "by heirs of the body I mean first and other sons successively," etc.¹ The effort to force less emphatic language under this exception and thaw, so to speak, the rule in Shelley's Case once more into a rule of construction, has not greatly succeeded however in England;² for there must be apt and direct language, according to the better opinion, for contradicting the rule which gives the fee to the ancestor. American precedents yield more in this respect certainly than the English;³ and, in fact, the rule of Shelley's Case, whose policy, never clearly revealed, is one of bygone times, has been abolished or changed by statute in most of our States,⁴ while in others the courts unaided have long felt competent to regard it as affording a mere presumption and no more, in those unfrequent cases where the question is raised for testamentary construction.⁵ A mass of our earlier American precedents have lost their drift and momentum in consequence, and to us whose policy is to break up and disperse property among heirs and kindred, the English canon, which stands for five centuries undisputed, loses most of its interest except for purposes of judicial comparison.⁶

As a word of limitation, "heirs" is collective, and signifies all the descendants *ad infinitum*; but when taken as a word of purchase it may denote particular persons who answer the

¹ 2 Ld. Raym. 1561; Goodtitle v. Herring, 1 East, 264; 2 Jarm. Wills, 382.

² See 23 Beav. 184; 2 Jarm. 379; 3 C. B. 349; Hawkins Wills, 187. This subject may be studied at length in 2 Jarm. 332-389. The rule in Shelley's Case applies to "limitations" by way of remainder, but not to a limitation by way of executory devise or shifting use, which would vest in the heir of the ancestor named as purchaser. 2 Jarm. 333.

³ Findlay v. Riddle, 3 Binn. 139; Blake v. Stone, 27 Vt. 475; Slemmer v. Crampton, 50 Iowa, 302; Fulton v. Harmon, 44 Md. 251; Burges v. Thomp-

son, 13 R. I. 712, and cases cited; Woodruff v. Woodruff, 32 Ga. 358.

⁴ See statutes, *e.g.*, of New Hampshire, Massachusetts, Connecticut, New York, New Jersey, Alabama, and since 1850 in nearly all of the United States. Hawkins Wills, 184, Sword's note; 2 Jarm. 332, Bigelow's note, and cases cited; 62 N. H. 44.

⁵ Smith v. Hastings, 29 Vt. 240; Hamilton v. Wentworth, 58 Me. 101; 15 Ohio, 559; 14 B. Mon. 570; Daniel v. Whartenby, 17 Wall. 639.

⁶ Yet the rule of Shelley's Case is still enforced in certain States. 118 Penn. St. 94; 108 Ind. 506; Ryan v. Allen, 120 Ill. 648; 101 N. C. 162.

description at a particular time and in a special sense, according to the case presented.¹ And if technical words are used not collectively for the inheritable successor, but distributively for particular persons, such persons will take as purchasers, unless the artificial rules we have considered are too obstinate to yield to the obvious meaning of the instrument.²

§ 554. **The Same Subject: "Issue."** — The word "issue" is of itself less precise and technical than "heirs of the body," though collective in sense and serving to point out as objects of the devise all the generations of descendants. The present disposition of the English courts appears, however, notwithstanding former doubts, in favor of making "issue" as synonymous, so far as possible, with "heirs of the body." Hence the rule that in devises of real estate, "issue" shall *prima facie* be construed as a word of limitation and equivalent to "heirs of the body."³ Thus a devise to A and his issue, or to A for life and after his decease to his issue, is taken to vest in A an estate tail; nor do mere words of distribution, which imply that the issue shall take share and share alike, etc., vary this construction. But while the rule in Shelley's Case scarcely yielded to intention, unless at all events squarely opposed by the context, a more gracious presumption here is found, and "issue" may be converted into a word of purchase by various indirect or explanatory expressions, to be found in the reports;⁴ as, for example, in a devise to A for life with remainder to his issue forever;⁵ and generally wherever words of distribution coupled with words purporting a fee are annexed to the gift to issue.⁶ The new Wills Act, it

¹ *Fulton v. Harman*, 45 Md. 251.

² *Burges v. Thompson*, 13 R. I. 712, 717.

³ *Roddy v. Fitzgerald*, 6 H. L. C. 823; *Woodhouse v. Herrick*, 1 K. & J. 352; *Bradley v. Cartwright*, L. R. 2 C. P. 511; 2 Jarm. Wills, 411, 412, and Bigelow's note; *Hawkins Wills*, 192; *King v. Savage*, 121 Mass. 303; 61 Ga. 77; *Robins v. Quinliven*, 79 Penn. St. 333.

⁴ As where, for instance, there is a

devise to one for life, with remainder to issue as tenants in common, followed by a limitation to the heirs general of the issue. *Slater v. Dangerfield*, 15 M. & W. 273; *Greenwood v. Rothwell*, 5 M. & G. 628; *Hawkins Wills*, 191; *Powell v. Board of Missions*, 49 Penn. St. 54. *Contra*, 3 Edw. Ch. 1.

⁵ *Myers v. Anderson*, 1 Strobh. Eq. 344.

⁶ See 2 Jarm. Wills, 411-439, for a minute examination of the English cases;

Hawkins Wills, 191-196.

would appear, operates to give the issue an estate in fee in remainder by purchase in every devise to a person for life, and after his decease, to his issue, in words which direct or imply distribution among the issue.¹

Our American doctrine favors a flexible construction of the word "issue" according to the whole purport of the will under consideration; and while courts may take it as *prima facie* a word of limitation, like "heirs of the body" in a devise, it becomes a word of purchase whenever the context prefers that meaning by using the words in a special or limited sense.² And we may add that many of our local acts which change or abolish the rule in Shelley's Case, turn "issue" as well as "heirs" or "heirs of the body" into words of presumable purchase.³ Indeed, American courts at this day are obviously disposed not to apply the rigid, technical rule we have described against the testator's apparent intent, to cases not literally within its scope.⁴

§ 555. **The Same Subject: "Children," etc.** — While "children" is not commonly a word of limitation, the influence of the rule in Shelley's Case has been felt in devises where this term was used instead of "heirs of the body" or "issue." An early precedent, Wild's Case, established in England that a devise of real estate to A and his children, A having no children at the date of the will, would vest in A an estate tail, "children" being here construed as a word of limitation.⁵ And whether A had children or not at that date, a devise to A would create an estate tail if such appeared to

¹ 2 Jarm. Wills, 439; Stat. 1 Vict. c. 26. "Issue" may be shown by the context to mean "children," rather than descendants in all generations. 2 Jarm. 440; Ryan v. Cowley, 1 D. & G. 7.

² 2 Jarm. Wills, 411, Bigelow's note; King v. Savage, 121 Mass. 303; Robins v. Quinliven, 79 Penn. St. 333; Daniel v. Whartenby, 17 Wall. 639.

³ *Supra*, § 553.

⁴ As where the words "lineal descendants" and "issue" are used, instead of "heirs." Henderson v. Hen-

derson, 64 Md. 185. Cf. 117 Penn. St. 127. Or where "heirs" has the sense of "children." 109 Ind. 476. And see 78 Me. 226; 24 S. C. 304. 136 Penn. St. 142; 127 Ind. 397.

⁵ Wild's Case, 6 Rep. 17; Hawkins Wills, 198; 2 Jarm. Wills, 389; Nightingale v. Burrell, 15 Pick. 104; 1 Sumn. 359; Hilliary v. Hilliary, 26 Md. 275; Miller v. Hart, 12 Ga. 359. Some States refuse to follow this rule. Carr v. Estill, 16 B. Mon. 309; Turner v. Ivie, 5 Heisk, 222.

be the testator's intention;¹ though the natural inference would be, if A and his children were then all alive, that the devise was to them all as one class.² Even the word "son" or "daughter" might be construed as a word of limitation with like effect;³ or the word "heir" or "child" in the singular.⁴

§ 556. **The Same Subject: Estates Tail not favored in the United States.**—Some of the more subtle and intricate refinements of construction relative to estates tail may be studied in the English cases and text-books, where it will be found that the statute of Victoria has pruned away much of the learned excrescence with which centuries had loaded this subject.⁵ In the United States estates tail are at this day either entirely abolished and converted into fees simple, or so changed as to vest an estate for life in the first taker with remainder over in fee, or otherwise disfavored by the local enactment.⁶ And judicial inclination in this country is to interpret each will, untrammelled by set phrases, and so that the intention of the maker may operate as freely and flexibly as possible within the lines which public policy assigns.

§ 557. **Bequests of Personalty; whether Absolute or for Life.**—In bequests of personalty, on the other hand, there never was a technical rule requiring words of inheritance to be annexed to a simple gift; and technical expressions which have operated only a life estate or conditional fee, so far as land was concerned, will constitute an absolute gift when applied to personal property. Under a bequest of chattels,

¹ Webb v. Byng, 2 K. & J. 669; affirmed in 10 H. L. C. 171; Wheatland v. Dodge, 10 Met. 502.

A devise to "A and his children forever," or to A and "his children in succession," will create an estate tail. 1 De G. F. & J. 613; Roper v. Roper, L. R. 3 C. P. 32.

² 2 Jarm. 393.

³ Robinson v. Robinson, 1 Burr. 38;

2 Jarm. Wills, 401-410, where this subject is fully examined.

⁴ Co. Lit. 9 b. n. (4); Hawkins Wills, 198.

⁵ 2 Jarm. Wills, 447-561; Hawkins Wills, 199-204; Appendix, *post*.

⁶ Van Rensselaer v. Kearney, 11 How. 297; 1 Pet. 510; 4 Kent Com. 14, 15; 73 Ga. 215; Leathers v. Gray, 101 N. C. 162.

for instance, A takes an estate free from any apparent limitation to the heirs of his body.¹

But while it is settled by numerous cases, English and American, that the expression "heirs of the body" creates no estate tail in personalty, but rather confers the absolute interest upon the first taker,² it is doubtful whether the same distinction can avail where the word "issue" is used instead;³ for a bequest to "A and his issue" would seem to be governed by the same rules, so far as issue are concerned, as a gift simply to issue;⁴ at the same time yielding to clear indication that the will meant to give not to A and the issue, as one class, but to A for life and then to the issue by way of remainder.⁵ At all events, a bequest to a parent and his "children" simply, gives *prima facie* to parent and children concurrently;⁶ although slight circumstances may show that the testator intended differently;⁷ for the rule in Wild's Case does not apply to personal estate.⁸

§ 558. **The Same Subject.**—As for expectant interests in personalty under a will, there can be no doubt in modern times, that a person may bequeath personal property to A for life or a designated period, with remainder over to B, and this whether the goods and chattels or the use thereof be given to A by the express terms of the will.⁹ It is a mere question of intention, under the will; and the testator thus intending it, A has merely a life or other temporary interest, while B

¹ Chatham v. Tothill, 7 Bro. P. C. 453; 19 Ves. 73; 2 Jarm. 562; Williams v. Lewis, 6 H. L. C. 1013; Hawkins Wills, 188; Childers v. Childers, 21 Ga. 377; 5 Ired. Eq. 7; Dunlap v. Garlington, 17 S. C. 567; U. S. Dig. 1st Series, Will, 1733.

² 2 Jarm. 562, Bigelow's note; Chatham v. Tothill, and other cases *supra*.

³ Hawkins Wills, 197. It is ruled that if personal estate or chattels real are given to A for life, and after his decease, to his issue, A takes for life only, and the issue take in remainder. Knight v. Ellis, 2 Bro. C. C. 570; Wynch, *Ex parte*, 5 D. M. & G. 188;

Myers's Appeal, 49 Penn. St. 111. But see 7 Rich. Eq. 358; Hawkins Wills, 197, Sword's note. See also 2 Jarm. Wills, 566-573.

⁴ *Supra*, § 535.

⁵ Parkin v. Knight, 15 Sim. 83; Hawkins Wills, 197, 198.

⁶ Crockett v. Crockett, 2 Phill. 553; De Witte v. De Witte, 11 Sim. 41; Cannon v. Apperson, 14 Lea, 553.

⁷ Crockett v. Crockett, *supra*.

⁸ 2 Jarm. Wills, 573.

⁹ 1 Schoul. Pers. Prop. 2 ed. § 138; 2 Kent Com. 352; 2 Bl. Com. 398; Hyde v. Parrat, 1 P. Wms. 1; Smith v. Bell, 6 Pet. 68; 41 N. J. Eq. 89.

takes a vested interest by way of remainder.¹ And generally speaking (subject, of course, to the rule against perpetuities),² one may create successive life or temporary interests by his will.³ But perishable articles, or those like wine, corn, and other articles of food or drink, whose use consists in their consumption, constitute usually an exception; since their use consists in consumption, though no presumption of this kind can be asserted against the obvious force and meaning of the will.⁴

Thus a gift of personal property which is consumable, to A for her natural life, coupled with an absolute power to sell it for her own benefit if she shall see fit to do it, and with no gift over, gives her an absolute interest in the property, and not merely a life interest with power to dispose during her life.⁵ A testator may give the entire beneficial interest in a bequest to A, and at the same time bequeath the sum in trust, so that the income shall be paid regularly, but the principal withheld at the trustee's discretion.⁶ But where it is the testator's manifest intent to sever the product from its source, a bequest of the income of an estate consisting of personalty will not carry an absolute estate in the principal.⁷ Whether property be consumable or not, an absolute power of disposal in the first taker carries by presumption the absolute interest, and leaves any subsequent limitation of the property void.⁸ A contingent and limited power to dispose (as in case of need) might perhaps be otherwise construed;⁹ but an unlimited and positive discretion in disposing of the fund for the individual advantage of one's self and others confers an absolute interest on that individual.¹⁰

¹ *Ib.*

² *Supra*, § 21.

³ 1 Schoul. Pers. Prop. § 138.

⁴ 1 Schoul. Pers. Prop. § 140, and cases cited; Perry Trusts, § 547; Randall v. Russell, 3 Mer. 194. If the testator meant otherwise, it is easy to convert the perishable articles into money, and then invest for the benefit of life and remainder parties respectively.

⁵ Bradley v. Westcott, 13 Ves. 445; Pennock v. Pennock, L. R. 13 Eq. 144;

Diehl's Appeal, 36 Penn. St. 120; Kendall v. Kendall, 36 N. J. Eq. 91, 96; Smith v. Bell, 6 Pet. 68.

⁶ Millard's Appeal, 87 Penn. St. 457.

⁷ Bentley v. Kauffman, 86 Penn. St. 99; 39 Ch. D. 50.

⁸ Jones v. Bacon, 68 Me. 34; Howard v. Carusi, 109 U. S. 725; 4 Del. Ch. 311.

⁹ Stevens v. Winship, 1 Pick. 318.

¹⁰ Yates v. Clark, 56 Miss. 212; cases *supra*.

§ 558 *a. Gifts to Servants, Strangers, etc.* — A devise or legacy is not unfrequently given to a servant or servants of the testator. Where a gift is made to such as may answer that description, and without identifying particular persons as the objects of one's bounty, courts incline to limit its benefit if not to strict "household" servants, at least to such as spend their whole time in the master's employ; not extending the gift, in its scope, to persons who come back and forth for casual employment and work also for others.¹

§ 559. *Devise or Bequest; whether Absolute or not.* — And yet the decisions on such points seem sometimes to run closely together; and intention affords the only sure clue to their course. A bequest of non-consumable personal property to the testator's wife "for her own use, benefit and disposal absolutely," and remainder after her death to a son, has been held to create a life estate in the wife and a vested remainder in the child;² simply because the context of the will in controversy made it clear that the testator intended to make a present provision for the one and a future provision for the other. On the other hand, an absolute gift of personal property to the wife, together with the life income of real estate, and "at her decease the property remaining to be divided equally" among the children, has been pronounced rather an absolute gift of personalty to the wife, with full right to appropriate the residue to herself after the estate was settled;³ for the gift clearly expressed in positive terms was not to be cut down by any doubtful inference from subsequent words. Where, however, the power of disposal accompanies a bequest or devise of a mere life estate, the power is limited to such disposition as a tenant for life can make, unless other words clearly indicate that a larger power was intended.⁴ A be-

¹ Metcalf *v.* Sweeney (R. I.), 21 Atl. 365; Townshend *v.* Windham, 2 Vern. 546; 9 Jur. 936.

² Smith *v.* Bell, 6 Pet. 68.

³ McKim *v.* Harwood, 129 Mass. 75.

⁴ Brant *v.* Virginia Coal Co., 93 U. S. 326; Boyd *v.* Strahan, 36 Ill. 355;

Smith *v.* Bell, *supra*. Many of the precedents to this effect arise with reference to the provision made for a testator's widow, and are biassed by the disfavor with which the old law viewed the passage of one's lands from his own family to that of his wife.

quest unlimited and accompanied by an absolute power of disposition, passes, moreover, the whole interest, notwithstanding precatory words of the will as to the manner of disposal.¹

As a rule, an absolute devise in terms must be construed in connection with other clauses of the will which serve to modify its effect. And a fee which is given in the first part of a will may prove to be so restrained by subsequent words as to reduce it to a life estate.² But on the other hand, where a devise in fee is plainly given, it is not to be presumed that the testator meant by subsequent words to cut the estate down to one for life unless his language clearly indicates such intent.³ Nor is a devise in fee simple the less absolute in interest because the devise stands in trust and a restraint is put upon the annual expenditure of income or the receipt of the principal by the beneficiary.⁴ It is well established that notwithstanding any formal limitation over, the limitation over is void when the will shows a clear purpose to give an absolute power of disposition to the first taker.⁵ On the other hand, a power of disposition annexed to an express estate for life, or a charge upon it, is not properly construed as enlarging the latter into a fee unless inconsistent with an estate for life only.⁶ And, generally speaking, a larger estate will not be implied where a smaller one is expressly granted; for not only favor to the inheritance, but good sense, opposes such an inference.

§ 560. Life Estate and Remainder in Gifts; Executory Devise.

— A will may limit real estate likewise, for life or years, and

¹ 113 Ind. 18; §§ 595-597.

² *North v. Martin*, 6 Sim. 266; *Ulrich's Appeal*, 86 Penn. St. 386; *Fearne Conting. Rem.* 151.

³ *Fairfax v. Brown*, 60 Md. 50. And see *supra*, § 518.

⁴ *Fairfax v. Brown*, 60 Md. 50.

⁵ *Ross v. Ross*, 1 Jac. & W. 154; *Ide v. Ide*, 5 Mass. 500; *Jackson v. Bull*, 10 Johns. 18; 110 Mass. 432; 4 Leigh. 408; *Howard v. Carusi*, 109 U. S. 725; 78 Me. 313; 54 Conn. 470; 79 Ala. 63.

⁶ *Wetter v. Walker*, 62 Ga. 142; *Corey v. Corey*, 37 N. J. Eq. 198; *Hinkle's Appeal*, 116 Penn. St. 490; *Jones v. Jones*, 66 Wis. 310; *Rhode Island Trust Co. v. Commercial Bank*, 14 R. I. 625. The gift of an estate for life with absolute power of sale does not create a fee, unless the power is exercised during the tenant's lifetime. *Russell v. Eubanks*, 84 Mo. 82.

then over, and with respect to their time of enjoyment create estates either in immediate possession or in expectancy, so long as the rule against perpetuities is not violated. And remainders under a will may be vested or contingent; though, in case of doubt, the former and simpler should in these days be preferred in construction.¹ Under the doctrine of executory devise, moreover, the limitation of a future estate or interest in lands or chattels is permitted by will where limitations in a deed *inter vivos* would have failed for informality; yet once more we should exclude the executory devise in construction if the estate can fairly pass as a remainder;² or if an absolute estate can be properly inferred in the first taker.³ We find the corresponding term "executory bequest" well applied in the gift of personal property, wherever a future bequest is made. For while at common law there could be no limitation over of chattels, or successive interests, we find gifts for life or temporarily and then over, or with accumulation of income in the hands of trustees, and to vest hereafter

¹ *Olney v. Hull*, 21 Pick. 311; *Miller v. Keegan*, 14 Ind. 502; 2 Grant Cas. 28; *Smith v. West*, 103 Ill. 332; 1 Jarm. Wills, 873; 2 ib. 88; *De Vaughn v. McLeroy*, 82 Ga. 687; 41 Kan. 424. One reason for such a construction at common law is that the owner of the first particular estate may defeat a contingent remainder, and thus make the gift over by the will a dead letter.

² 1 Jarm. Wills, 864; *Hawley v. Northampton*, 8 Mass. 3; 57 Conn. 163.

³ *Howard v. Carusi*, 109 U. S. 725, 730, and cases cited; 102 N. Y. 128.

A *vested remainder* is where a present interest passes to a certain and definite person but to be enjoyed *in futuro*; and there must be a particular estate to support it. A contingent remainder is where the estate in remainder is limited either to a dubious and uncertain person or upon the happening of a dubious and uncertain event. A contingent remainder, if it amount to a freehold, cannot be limited on an estate for years, nor any estate less than a freehold. A *contingent remainder* may be defeated

by the determination or destruction of the particular estate before the contingency happens; hence, trustees are appointed to preserve such remainders. An *executory devise* is such a disposition of real property by will, that no estate vests thereby at the death of the deviser, but only on a future contingency. It differs from a remainder in three material points: (1) it needs no particular estate to support it; (2) a fee simple, or other less estate may be limited by it after a fee simple; (3) a remainder may be limited, of a chattel interest, after a particular estate for life in the same property. The law will not construe a limitation in a will into an executory devise when it can take effect as a remainder; nor a remainder to be contingent when it can be taken to be vested. The rule is that estates shall be held to vest at the earliest possible period, unless the testator's intent be clearly manifested to the contrary. Mr. Justice Swaine in *Doe v. Considine*, 6 Wall. 458, 474, and cases cited.

in beneficial enjoyment permitted in modern times, and in fact very common, within the usual bounds which limit accumulation and postponement; and if, as formerly, remainders in personalty cannot, strictly speaking, be created, the future limitation is good, at all events, by way of executory bequest.¹

§ 561. **Devise or Bequest by Implication.**—A devise, whether absolutely or for life, will be raised by implication under a will, where the context requires it and the devise is not express in terms. Thus the gift of the rest and residue of one's estate to his children after the death of the wife creates a life estate in the wife by implication.² And again, the will may so refer to one as heir, as to give him the fee without words of express devise;³ not to repeat the well-known maxim that only by an express devise or necessary implication can the heir-at-law be disinherited.⁴ Implication is excluded, however, where a devise sufficient in effect was express; it is not deducible from mere silence; nor can it be admitted at all except as a means of carrying out what the testator appears on the whole to have really meant, but failed somehow to express as distinctly as he should have done.⁵

As already seen, while a larger estate is not to be implied where a smaller one is expressly given, or *vice versa*, an absolute gift may be implied, rather than any temporary interest, from the incidents of a *jus disponendi* expressly annexed to

¹ See 2 Jarm. Wills, 879.

The subject of executory devises and bequests may be examined at length in 1 Jarm. Wills, 864-881, and Bigelow's notes.

A valid executory devise cannot, at common law, be limited after a fee, upon the contingency of the non-execution of an absolute power of disposition vested in the first taker, and such a limitation over is void. *Van Horne v. Campbell*, 100 N. Y. 287. And see 15 R. I. 78.

Local statutes sometimes provide that

future estates, whether vested or contingent, are descendible. 6 Dem. (N. Y.) 220.

² *Macy v. Sawyer*, 66 How. Pr. 381. And see *Sisson v. Seabury*, 1 Sumn. 235; *Hill v. Thomas*, 11 S. C. 346; 1 Jarm. Wills, 533; *Masterson v. Townsend*, 123 N. Y. 458.

³ 3 Keb. 589.

⁴ *Supra*, § 479; 1 Jarm. 532.

⁵ *Patton v. Randall*, 1 J. & W. 196; *Rathbone v. Dyckman*, 3 Paige, 27; 1 Jarm. Wills, 526, 532, and Bigelow's note; 1 Stra. 427; *Adams v. Adams*, 1

the gift.¹ So, too, are gifts in favor ultimately of third persons constituting a class implied frequently, from powers of selection and distribution among them which the will confers upon the first taker, but which the latter has failed to exercise;² but an express gift over in default of the exercise of such power precludes of course all implication.³

In short, a gift by implication may be presumed wherever the conclusion is irresistible that the testator so intended it.⁴

§ 562. **Gift in General, whether Vested or Contingent in Interest.**—As a rule, a devise or bequest is to be presumed vested, rather than contingent in interest; for whether the property be real or personal, the law favors the vesting of estates; at the same time that the manifest purpose of the will cannot be thus subverted. A will takes effect naturally on the death of the testator; consequently interests under that will, whether immediate or prospective in term of enjoyment, vest *prima facie* at once, and words of futurity contained in the gift should be taken in the sense that no condition precedent is imposed.⁵ Thus, if the gift in A's favor is to be

Hare, 537; Nickerson v. Bowly, 8 Met. 424; Rawlins's Trusts, 45 Ch. D. 299. Unless convinced that the testator really intended to make the gift, a court should not construe in favor of a gift by implication. Bishop v. McClelland, 44 N. J. Eq. 450.

It appears sometimes to be considered that the rule of implication does not apply to bequests as in devises. See 1 Ired. Eq. 45. But admitting that limitations are less to be favored in gifts of personalty than under a devise of land, there seems no good reason why a life interest or an absolute interest may not be implied under a bequest where the intention of the will would otherwise be thwarted. See 1 Jarm. 544. But the next of kin, like the heir, is not to be displaced without express words or necessary implication. 3 Ves. 493; *supra*, §§ 479-482.

"Implication may either arise from an elliptical form of expression, which

involves and implies something else as contemplated by the person using the expression, or the implication may be founded upon the form of gift, or upon a direction to do something which cannot be carried into effect without of necessity involving something else in order to give effect to that direction, or something else which is a consequence necessarily resulting from that direction." Lord Westbury, in Parker v. Tootal, 11 H. L. C. 143; 161.

¹ *Supra*, §§ 557-559.

² 2 Jarm. Wills, 551; Brown v. Higgs, 4 Ves. 708, 5 Ves. 495, 8 Ves. 561; Butler v. Gray, L. R. 5 Ch. 30.

³ Roddy v. Fitzgerald, 6 H. L. C. 823.

⁴ Robinson v. Greene, 14 R. I. 181; Blake's Trusts, L. R. 3 Eq. 799.

⁵ 1 Jarm. Wills, 799-863, Bigelow's note, and numerous cases cited; Foster v. Holland, 56 Ala. 474; Dale v. White, 33 Conn. 294; 43 Md. 307; 83

set apart or payment made him at some future time ; or if A is to take a fee or the capital fund or residue after the termination of a life estate or some other beneficial interest therein of a temporary kind in B ; in these and similar instances the intention presumed from the language of the will is to postpone not the vesting of A's interest, but the time of beneficial enjoyment, and consequently his interest vests at once as well as B's.¹ Any present vested interest in the income carries *prima facie* a vested interest in those who shall finally take the capital, nor does delay in settling the testator's estate and paying over prevent a legacy from vesting at the time of the testator's death.² Directions to sell at a late period prescribed are consistent with a vested remainder.³

Words and expressions literally contingent in import, or those at least to which courts are wont to give that technical meaning, bend to this construction in favor of vesting the estate or interest upon due regard for the whole scope and tenor of the will.⁴ The simple postponement of enjoyment under the gift does not, in other words, create of itself a contingency ; for while a gift when (or, rather, if) one reaches a certain age or marries is necessarily uncertain in event, a gift upon the death of another person hinges upon an event which is sure sooner or later to happen ; hence the interest may be presumed vested in the latter, though not in the former case, because the event here is certain.⁵ And so far is this rule

Ky. 481 ; 57 Conn. 295 ; 116 Ind. 498 ; Goebel v. Wolf, 113 N. Y. 405.

As to the precise distinction between the terms "vested" and "contingent," there is some discussion ; and the logical antithesis may not be quite the same in gifts of land as of personalty. The general doctrine in this country is that a postponement will not of itself create a contingency, unless it be upon an event of such a nature that the testator must be presumed to have made no gift unless the event happened, or, as it is sometimes put, unless the time be annexed to the substance of the gift. 1 Bradf. (N. Y.) 154. See Hawkins Wills, 223. The English disposition is

to treat the rule as to the vesting of gifts by will differently, according as the subject-matter is personal estate, real estate, or, once more perhaps, a legacy charged on land.

¹ 2 Jarm. Wills, 799, 835, 837, Bigelow's note, and numerous cases cited ; Monkhouse v. Holme, 1 Bro. C. C. 300.

² Dawson v. Killet, 1 Bro. C. C. 124 ; 9 Cush. 516 ; Birdsall v. Hewlett, 1 Paige, 32 ; Gifford v. Thorn, 1 Stockt. 702 ; Scott v. West, 63 Wis. 529.

³ De Vaughn v. McLeroy, 82 Ga. 687.

⁴ 1 Jarm. Wills, 805, and cases cited ; Colt v. Hubbard, 33 Conn. 281.

⁵ See Thomas v. Anderson, 6 C. E.

carried, that whenever the prior estate will terminate by an event certain, the remainder must be presumed a vested one, even though the event may happen before the expiration of the estate limited in remainder.¹

On the other hand, no favor to vested interests or theory should defeat the plain intention of the will in controversy. Nor can the absurd, inconvenient or illegal consequences of treating the interest as contingent and postponed prevent such a construction if the testator has clearly limited the estate in terms of contingency;² nor the probability that the testator in so limiting the estate has misapprehended his power of disposition;³ unless, indeed, too strict an adherence to the letter of the instrument would defeat the spirit of its provisions.⁴

A gift made expressly to take effect on a contingency will not arise unless the contingency happens; and, *per contra*, a vested gift is not divested unless all the events which are to precede the vesting elsewhere concert.⁵ A gift with limita-

Green, 22; Taylor v. Mosher, 29 Md. 443; 117 Penn. St. 14.

¹ Kennard v. Kennard, 63 N. H. 303. Here the reversion to A was on the "decease or marriage" of the testator's widow; and A's widow (not remarrying) survived A; yet A's reversion vested. "It is the present [certain] right of future enjoyment whenever the possession becomes vacant, and not the certainty that the possession will become vacant before the estate limited in remainder determines, that distinguishes a vested from a contingent remainder." *Ib.* 310. And see Lenz v. Prescott, 144 Mass. 505.

"Die before being entitled" held, as to remaindermen to mean "die before they come into possession." 31 Ch. D. 75.

Legacies though described as not to be paid until one year after A's death, vest at once under the will. Pond v. Allen, 15 R. I. 171. The word "heirs," when uncontrolled, has the effect of vesting a legacy which would otherwise be contingent. 117 Penn. St. 14.

² 1 Jarm. 821; Holmes v. Cradock, 3 Ves. 317; Richardson v. Wheatland, 7 Met. 171; Wallace v. Minor, 86 Va. 550.

³ Vessey v. Wilkinson, 2 T. R. 209; Sears v. Russell, 8 Gray 86; Donohue v. McNichol, 61 Penn. St. 73. Vesting held postponed to the death or marriage of the widow in 67 Md. 465; 26 S. C. 450. This was taken to be the testator's meaning.

⁴ 1 Jarm. Wills, 824; Bradford v. Foley, Doug. 63; Hawkins Wills, 223.

⁵ Co. Lit. 219 b; 7 East, 269; 1 Jarm. 827.

If we consider our policy as favoring all the interests under a will as vested rather than contingent, the precedents are not so difficult to reconcile as their literal expression imports. Thus, a gift is to A if he reaches a certain age or marries; and here it may be presumed that the testator meant that unless A reached that age or married, he should not have it; the gift is therefore contingent, or coupled with a condition precedent to vesting. See Leake v.

tion even upon a contingency becomes absolute upon a failure of the contingency.¹ And interests under a will may vest immediately upon the testator's death, subject to a possible divestment afterwards.²

§ 563. **Beneficiaries: when ascertained.**—At what time beneficiaries should be ascertained is an important point to consider. As vested interests, whether by way of remainder or otherwise, are preferred in construction to those which are contingent, so should the ascertainment of any class which is described in the will be referred to the earliest possible period consistent with a fair interpretation of that will. Thus, to take the word "heir." If the will gives to the testator's own heir, the gift vests naturally at the testator's own death; if to the heir of A, then at A's death; and in either case, as

Robinson, 2 Mer. 363; Hawkins Wills, 224. And the same might be true of members of a class. *Ib.* But if the will appears to give to A or to members of a class, and merely adds a direction as to the time of payment, payable at majority, divided among them for convenience at some future period stated, etc., and the more so if the income is meanwhile to be paid to the beneficiary or beneficiaries, it is not clear that the testator meant to annex the time as an essential to the substance of the gift; hence the doubt is resolved in favor of vesting the gift or gifts. See Hawkins Wills, 225, 232; *Lister v. Bradley*, 1 Hare, 12.

As for devises of real estate, Best, C. J., may be quoted: "It has long been an established rule for the guidance of the court, that all estates are to be holden to be vested, except estates in the devise of which a condition precedent is so clearly expressed that the courts cannot treat them as vested without deciding in direct opposition to the terms of the will." *Duffield v. Duffield*, 1 D. & Cl. 311.

If real estate is devised to A "if" or "when" he shall attain a given age, with a limitation over in the event of his dying sooner, the attainment of that

age is held to be not a condition precedent but a condition subsequent, and A takes an immediate vested estate subject to be divested upon his death under the specified age. *Phipps v. Ackers*, 9 Cl. & F. 583; 1 B. & P. N. R. 324; *Roome v. Phillips*, 24 N. Y. 465. This construction appears sometimes favored in bequests of personalty, especially if real and personal property are embraced in one gift. 12 B. Mon. 117; Hawkins Wills, 240. And see c. 4.

The use of the word "proviso" in modern times favors the idea of a fee upon trust rather than a devise upon condition. Whether words in a devise shall or shall not constitute common-law conditions whose breach will work a forfeiture and defeat the whole devise, must be gathered from the whole instrument and not from particular expressions. *Stanley v. Colt*, 5 Wall. 119. See also *Cropley v. Cooper*, 19 Wall. 167; 3 Pet. 34; 2 How. 43.

A stranger cannot take advantage of the breach of a condition subsequent under a will. *Webster v. Cooper*, 14 How. 488.

¹ *Derickson v. Garden*, 5 Del. Cl. 323.

² *Neilson v. Bishop*, 45 N. J. Eq. 473.

soon as there exists any one who answers the description of heir.¹ This rule of presumption avails for gifts of personalty as well as real estate, so convenient is it to apply; and slight circumstances or mere conjecture that the testator meant otherwise should not induce the court to supersede it.² In short, estates, legal or equitable, which are given the will, should be regarded as vesting immediately upon the testator's death unless an intention to the contrary is manifest.³

But if the will sets clearly in another direction, its lead must be followed; as where the gift is to such person as shall, at the specified time after the testator's death, be the "heir" in question; or where it is in favor of the "heir" of some person already dead at the date of the will; or where, once more, to take the instance of a gift whose object is wholly contingent, land is devised to such person as may at some designated period after the devisor's death be his "heir" of the name of H.⁴

¹ *Pilkington v. Spratt*, 5 B. & Ad. 731; 1 Vern. 35; 2 Jarm. Wills, 62, 88; *Minot v. Tappan*, 122 Mass. 38. Aside from the rule in *Shelley's Case*, therefore, a gift of land to A with remainder to his heirs vests the remainder immediately in the heirs apparent. *Moore v. Little*, 41 N. Y. 66; *Mortimer v. Slater*, 7 Ch. D. 322; 4 App. Cas. 448. By "my heirs-at-law" in a will, the testator is presumed to mean that those shall take who are his heirs-at-law at his decease. *Whall v. Converse*, 146 Mass. 345. A testator gave property in trust for his children, with provisions for their support and for vesting in each absolutely on his suitable marriage. One child died unmarried; yet it was held that this child's share had vested, and that marriage was not a condition precedent. *Toner v. Collins*, 67 Iowa, 369. In 40 N. J. Eq. 443 it was held that the estate vested in children at the time of the testator's death and not at the time of distribution.

Where a gift is to nephews and nieces,

with provision for representation in case any one of them should predecease the testator, the children of a nephew who was dead at the date of the will are not included. 43 Ch. D. 569.

² *Boydell v. Golightly*, 14 Sim. 327; 14 M. & W. 214; *Campbell v. Rawdon*, 18 N. Y. 412; *Buzby's Appeal*, 61 Penn. St. 114; 5 Jones Eq. 267; *Abbott v. Bradstreet*, 3 Allen, 587. And see *Dove v. Torr*, 128 Mass. 38, for a marked instance where the rule was applied notwithstanding the words, "who may then be entitled," etc., after referring to a daughter's marriage or death. See also 26 S. C. 561.

³ *Scott v. West*, 63 Wis. 529; 113 Ill. 637; 40 N. J. Eq. 443; § 562.

⁴ *Wrightson v. Macaulay*, 14 M. & W. 214; 2 Jarm. 89; *Donohue v. McNichol*, 61 Penn. St. 73; *Sears v. Russell*, 8 Gray, 86; *Evans v. Godbold*, 6 Rich. Eq. 26. An immediate gift to the "heirs of A," who is recognized in the will as living, is presumed to be a gift to those persons who would be his heirs if he were dead at the time of the gift.

A devise or bequest to "next of kin" means also those *prima facie* who prove such at the death of the person whose next of kin are spoken of.¹ Thus, if the gift be to A for life, and after his death to the testator's next of kin, the persons to take as next of kin should be ascertained at the death of the testator, and not at the death of A. And it follows, that if the gift be to A for life, and after his decease to the next of kin of the testator, and A proves the sole next of kin when the testator dies, the gift will go to A absolutely.² Words of futurity alone do not exclude this presumption of immediate vesting, nor will it yield to doubtful conjecture;³ and while the clear language of a particular will may require the next of kin to be ascertained instead at the period of distribution, courts will favor no surmise of this kind.⁴ But rather than permit a gift to lapse from the failure of objects when the will takes effect, courts have sometimes construed a bequest to the next of kin of one who predeceased the testator as referring to next of kin computed at the testator's own death.⁵

A legacy, by the general familiar rule of law, lapses if the legatee named dies before the testator.⁶ A legacy to parties jointly might have this same disastrous effect by the predecease of one or more of them. But where an entire legacy

Hawkins Wills, 92, Sword's note; 3 Sandf. Ch. 67; Campbell v. Rawdon, 18 N. Y. 417; 2 Dev. Eq. 517; 6 Ala. 36; 18 B. Mon. 370; Bailey v. Patterson, 3 Rich. Eq. 158. Where the devise is to A for life, remainder to the right heirs of the testator, and A is the testator's heir at law at his death, A takes the property absolutely. Holloway v. Holloway, 5 Ves. 399; Hawkins Wills, 100. But a gift to the testator's "surviving heirs" at the death of his widow, is held to mean those who should at her death be his heirs. Evans v. Godbold, 6 Rich. Eq. 26. See as to "surviving," § 565.

¹ Hawkins Wills, 99; Gundry v. Pinninger, 1 D. M. G. 502; Bullock v. Downes, 9 H. L. C. 1; 5 Hare, 557; Letchworth's Appeal, 30 Penn. St. 175; Brent v. Washington, 18 Gratt. 555.

² Holloway v. Holloway, 5 Ves. 399; 4 K. & J. 498; Ware v. Rowland, 2 Phill. 635.

³ 16 Beav. 507; 17 Beav. 417; 3 East, 278; Rayner v. Mowbray, 3 Bro. C. C. 234.

⁴ Bullock v. Downes, 9 H. L. C. 1; White v. Springeth, L. R. 4 Ch. 300; cf. Wharton v. Barker, 4 K. & J. 483; Hawkins Wills, 101, 102. But cf. the case of an annuity, 45 Ch. D. 453.

⁵ Wharton v. Barker, *supra*. For the same rule in a substitutional bequest to "heirs," see Gamboa's Trusts, 4 K. & J. 756. But cf. Rees *Re*, 44 Ch. D. 484.

"Children," we have seen, means *prima facie* those existing at the testator's death. *Supra*, § 529.

⁶ Schoul. Exrs. § 467.

is given plainly to a class, it will be taken by the individuals who compose that class on the death of the testator.¹

§ 564. **The Same Subject: "Dying without Issue," etc.** — The influence of this same policy in favor of an early vesting is perceived in the modern construction of such phrases as "die without issue." By the old rule, as applied to gifts of real and personal estate alike, the words "die without issue" meant *prima facie* an indefinite failure of issue; that is to say, not merely at the death of the person spoken of, but at any time afterwards.² Thus, if real estate were devised to A, with a limitation over, in the event of his dying without issue, A took an estate tail with remainder over, while in a corresponding bequest of chattels the gift over was void for remoteness, and A took the absolute interest.³

But this enlarged construction of technical words, so as to mean posterity, must often have defeated a testator's actual purpose; and various exceptions came accordingly to be recognized.⁴

In some American States the English rule was either rejected altogether, or else allowed within very narrow limits

¹ Hall v. Smith, 61 N. H. 144, and cases cited.

² 8 Co. 86; *Beauclerk v. Dormer*, 2 Atk. 313; *Candy v. Campbell*, 2 Cl. & F. 421; 2 Jarm. Wills, 497 *et seq.* and *Bigelow's Am. note*; *Allen v. School Fund*, 102 Mass. 262; *Vaughan v. Dickes*, 20 Penn. St. 509; *Arnold v. Brown*, 7 R. I. 188; 6 Cold. 479; *Huxford v. Milligan*, 50 Md. 542; 4 Kent Com. 280.

³ *Hawkins Wills*, 206.

Other expressions were treated as equivalent in effect. Thus, "die without having issue." 13 C. B. 445; *Vaughan v. Dickes*, 20 Penn. St. 509. Or "die without children," so far at least as a devise of land was concerned; *Hawkins Wills*, 206; 5 Bing. 243; 1 K. & J. 156; but not so readily in a bequest of chattels. 40 Penn. St. 18.

As for the words, "die without leaving issue," the construction varied ac-

cording to the kind of property given; for under a devise of realty it meant the same as "dying without issue," indefinitely, but under a bequest of chattels only a definite failure, *i.e.*, without issue at the death of the person spoken of. *Forth v. Chapman*, 1 P. W. 663; 3 Paige, 30; 33 Md. 11; *Hawkins Wills*, 213, *Sword's note*, and cases cited. Some States construe it as a definite failure of issue in either case.

⁴ One admitted exception was where the context of the will disclosed an intention on the testator's part that the ultimate devise should take effect at the death of the first taker; where, for instance, there was a gift over to the survivors or survivor; or the gift was expressly to take effect on the first taker's death. See *Hawkins Wills*, 206-212; 3 B. & Ald. 546; 1 K. & J. 156; 18 N. H. 321; 2 My. & K. 441; § 565.

long ago.¹ And public policy settling gradually in favor of the more constrained and natural meaning of the phrase, legislation, both in England and many parts of the United States, has at length reversed this presumption altogether. In devises and bequests of real or personal estate, the expressions "die without issue," "die without having (or 'leaving') issue," and any other equivalent words, are construed at the present day to mean *prima facie* a failure of issue at the death of the person whose issue are spoken of, and not an indefinite failure of issue.²

In still other instances courts lean against raising or extending a contingency, and postponing the period of vesting. Thus, if personal estate be given to the children of A, to vest in them respectively on attaining a given age or marriage, a gift over will be construed, if possible, so as not to defeat their vested interests.³ But a vesting, by the terms of the will "from and after" some event later than the testator's death is by way of postponement.⁴

§ 565. **Substitution, Survivorship, etc.** — Wherever there is a bequest, whether immediate or deferred, to individuals, it is a rule that, be the legacy immediate or by way of remainder, a gift over of the legacy or share of a legatee dying under specified circumstances, shall take effect if the event happens in the testator's lifetime.⁵ Thus, if the bequest is to A, but

¹ Bullock v. Seymour, 33 Conn. 290; Parish v. Ferris, 6 Ohio St. 563; 14 B. Mon. 663; 16 Ga. 548. Slight circumstances to exclude operation of the rule are sometimes seized upon. Our legislation against estates tail (see *supra*, § 556) works counter to the presumption of the old law. For the American cases (which are in great confusion, each jurisdiction taking its own course), see *passim*, Hawkins Wills, 205-216, Sword's note; 2 Jarm. Wills, 497 *et seq.*, Bigelow's note.

² Such is the purport of Stat. 1 Vict. c. 26, § 29 (1837). And see the several codes of New York, New Jersey, Virginia, South Carolina, Wisconsin, Missouri, Minnesota, and other States

(several of them prior in date to the English Wills Act) cited in Hawkins Wills, 214, Sword's note; 4 Kent Com. 280. See also Phelps v. Phelps, 55 Conn. 359; Wills v. Wills, 85 Ky. 486.

³ Maitland v. Chalie, 6 Mad. 250; Hawkins Wills, 217. "Die without leaving issue" is not presumably to be construed "die without having had issue." 40 Ch. D. 11. "Die without lawful issue" confined by intent of the will to the time before grant of the absolute interest, in Lewin v. Killey, 13 App. Cas. 783.

⁴ Jobson *Re*, 44 Ch. D. 154. And see 150 Mass. 225.

⁵ Hawkins Wills, 253; Willing v. Baine, 3 P. Wms. 113; Walker v.

if he die under twenty-one, to B, and A dies, in fact, before the testator, the gift to B takes effect. Or if the bequest is to A for life, and after his death equally between B and C, with a gift over of the share of either dying in the lifetime of A, and B or C dies in the lifetime of A, and while the testator is alive, the gift over takes effect. For the argument that there can be no legacy to any one until the will speaks, and consequently no substitution, cannot here avail. Upon this proposition are grafted some very nice exceptions, as in gifts over to executors and administrators of the legatee, which are not immediate, and where the bequest is to a class whose members cannot be ascertained during the testator's life; these we need not trace out.¹ The use of "or" is frequent to denote a substituted gift, whether of personalty or of real and personal estate together; the period of substitution referred to being usually deemed that of the testator's death.²

If a bequest is to one person, and "in case of his death" to another, the gift over takes effect *prima facie* only in the event of the prior legatee's death before the period of payment or distribution;³ agreeably to the rule which favors an early vesting and the prompt settlement of the decedent's estate. Moreover, a gift to A, and, in case of his death, to B, is, if possible, narrowed so as to give A the absolute interest, unless he dies before the testator.⁴

As to gifts made to persons who shall be surviving at some period not clearly specified in the will, the inclination of the courts was, formerly, to refer the survivorship *prima facie* to the period of the testator's own death.⁵ Such is still the

Maine, 1 J. & W. 1; *Mowatt v. Carrow*, 7 Paige, 336. Even though the legatee were dead when the will was made, the rule takes effect. 16 Beav. 56.

¹ See *Hawkins Wills*, 245-254, *Sword's* note, where various precedents, somewhat discordant, are brought together; the context and general scope of the will resolving all such disputes at last. And see 2 *Jarm. Wills*, 497, 154, *Bigelow's* scholarly note; *Ib.* 721 *et seq.*

² *Wingfield v. Wingfield*, 9 Ch. D.

658; 25 Ch. D. 212; *O'Rourke v. Beard*, 151 Mass. 9. That "or" is frequently read "and" out of respect to a testator's intent, see § 477.

³ *Ommaney v. Bevan*, 18 Ves. 291; *Home v. Pillans*, 2 M. & K. 15; *Hawkins Wills*, 254.

⁴ *Home v. Pillans*, 2 M. & K. 23; *Stevenson v. Fox*, 125 Penn. St. 568; *Webb v. Lines*, 57 Conn. 154.

⁵ *Hawkins Wills*, 260.

prevailing preference in construction where real estate is devised;¹ and it holds in many of the United States, irrespective of the kind of property given;² but the late English precedents refer words of survivorship *prima facie* to the period of payment and distribution instead, where personal estate is bequeathed to certain persons by name, or to a class of persons as tenants in common, and the survivors of them.³ Into the long-drawn controversy over this change of construction we shrink from entering.⁴ Words of survivorship, may, agreeably to the true intent of the will in its full scope, refer to the death of some party subsequent to the testator's own death.⁵

¹ Doe v. Priggs, 8 B. & Cr. 231; 2 De G. J. & S. 437; Hawkins Wills, 262. But see Wigram, V. C., in Buckle v. Fawcett, opposing any distinction between real and personal estate on this point. A devise to a class takes effect *prima facie* in favor of those who constitute the class at the testator's death. 2 Jarm. 154, and Bigelow's note; *supra*, § 529.

² Moore v. Lyons, 25 Wend. 119; Ross v. Drake, 37 Penn. St. 373; Hawkins Wills, 261, and Sword's note; Martin v. Kirby, 11 Gratt. 67; 5 Cush. 153; 2 Jarm. Wills, 154, and Bigelow's note; Davis v. Davis, 118 N. Y. 411.

³ Cripps v. Wolcott, 4 Mad. 11; Hawkins Wills, 261. The authority of Cripps v. Wolcott is rejected in some American cases, like Moore v. Lyons and Ross v. Drake, *supra*. And see 2 Jarm. Wills, 728-751.

In Denny v. Kettell, 135 Mass. 138, where a fund consisting of real and personal property was left in trust, to go after the payment of certain legacies and the termination of certain life estates, in equal portions to the testator's "surviving nephews and nieces," the court preferred to reckon at the period when the time for final distribution came, rather than at the date of the testator. "The question to what period survivorship is to relate," observes Allen, J., "must depend rather upon

the apparent intention of the testator in each case, than upon any rigid rule. . . . This residue was not ascertainable till the time came for its distribution. The word 'surviving' more naturally relates to that time when the residue was to be ascertained and distributed." And see 45 N. J. Eq. 426.

⁴ Mr. Jarman, after a patient and laborious examination of the English precedents which have thus turned the course, concludes his chapter, like its commencement, with a caution. "This word 'survivor,'" said Wood, V. C., "is certainly one that ought to be avoided by any person who is not a consummate master of the art of conveyancing, for I suppose no word has occasioned more difficulty." 33 L. J. Ch. 532, quoted in 2 Jarm. Wills, 751.

Limitations upon which a devise is to take effect by survivorship rarely refer to death while the testator is alive; but the persons who are to take as survivors are meant to survive a death which happens after the testator's own decease. Crane v. Cowell, 2 Curt. 178.

⁵ § 563. As where the word "surviving" would otherwise be unnecessary and meaningless. 148 Mass. 576; 126 Penn. St. 562; Roundtree v. Roundtree, 26 S. C. 450. And see Bowman Re, 41 Ch. D. 525.

§ 566. Interest, whether by Way of Joint Tenancy or Co-Tenancy; Husband and Wife; etc — It has long been the rule in England, notwithstanding a former leaning of the courts against any joint tenancy in legacies of chattels, that either a devise or a bequest to several persons by name, or to a class, shall *per se* be presumed to create a joint tenancy among them.¹ This rule applies to children, issue, next of kin, and other classes of beneficiaries commonly found in a will; but not where the reference is to statutes of descent and distribution, and the right *per stirpes* enters plainly as an element of the gift.² Words which import distinctness of interest or equal division among the objects of the gift will also exclude the rule; as for example, in a devise or legacy to several or to a class "equally," or "between," or "among" them, to persons respectively;³ and wherever the intent is manifest to create a tenancy in common, or co-ownership, that intent must prevail.⁴ We may add that, in many of the United States, joint tenancy, with its peculiar incident of survivorship, is now cut down or abolished, though with reference more especially to real estate, and so as to leave the rule still in force where legacies and personalty are to be construed;⁵ and in England the later cases appear to lean in favor of a tenancy in common.⁶

The point of distinction here to be noted is, that, in case of a joint tenancy, the failure of a devise or bequest as to any one of the parties named will carry the gift to the other or others by force of survivorship, that striking incident of

¹ 1 Schoul. Pers. Prop. § 157; Hawkins Wills, 111; 5 T. R. 562; Bullock v. Downes, 9 H. L. C. 1; Campbell v. Campbell, 4 Bro. 15; 2 Kent Com. 351; Westcott v. Cady, 5 Johns. Ch. 334; 2 Jarm. Wills, 251-266; Atcheson v. Atcheson, 11 Beav. 485.

² Bullock v. Downes, *supra*. Although the interests of members of the class vest at different times, the rule applies. Hawkins Wills, 111; 2 Jarm. 255; 11 Hare, 196. It also applies to a gift to children by way of remainder after a prior life estate. 2 Jarm. 255;

1 Ch. D. 460. But not where some have a vested and others a contingent interest. 2 Jarm. 256; Hawkins Wills, 111; 1 D. F. & J. 74.

³ Eales v. Cardigan, 9 Sim. 384; Westcott v. Cady, *supra*; Martin v. Smith, 5 Binney, 18; Hawkins Wills, 112, and Sword's note; 2 Jarm. Wills, 258, and Bigelow's note; Walker v. Dewing, 8 Pick. 520; 3 Desaus. 288.

⁴ See *supra*, §§ 538-540.

⁵ Hawkins Wills, 111, and Sword's note; 4 Kent Com. 361, 362.

⁶ 2 Jarm. 258.

the relation; but when, on the other hand, the gift is to tenants in common, the death of one of them before the testator, or the failure of his share from some other cause, will produce a lapse with the usual result in favor of heir, next of kin, or residuary devisee or legatee, as the case may be.¹ If the gift vests at the testator's death, as where the gift is to objects as a class, each survivor takes his share, and the survivorship incident becomes exhausted.²

Another rule in this connection which yields as usual where the context requires it, is that where a devise or bequest is expressed to a husband and wife and another or others, it will be presumed that husband and wife were intended to take a single share, as one person, and not a share each; and this whether such gift was created by way of joint tenancy or a tenancy in common.³ The source of this maxim may, perhaps, be found in the doctrine of coverture, which is peculiar to our common law.⁴ And the maxim itself yields to an apparent intention of the testator to the contrary.⁵

¹ 2 Jarm. Wills, 265; *supra*, § 545; 1 Atk. 494; 119 Mass. 509; L. R. 10 Ch. 360.

² *Ibid.*

³ Co. Lit. 291; Wylde *Re*, 2 D. M. & G. 724; Hawkins Wills, 115; 2 Jarm. Wills, 252. American statutes affect this construction in various instances. Hawkins Wills, 111, Sword's note. And see Warrington *v.* Warrington, 2 Hare, 54, where the term of expression "my nephew W, and E his wife" and the context reversed the rule of the text.

⁴ 5 App. Cas. 123. Rule still applied, notwithstanding the married women's acts. 39 Ch. D. 148.

A gift to a legatee's "wife" does not pass to a woman from whom the legatee had been divorced before the testator's death. 40 Ch. D. 30; Bell *v.* Smalley, 45 N. J. Eq. 478. As to including a second husband, see 42 Ch. D. 54.

⁵ As in an appropriate residuary clause. Dixon *Re*, 42 Ch. D. 306.

CHAPTER III.

EXTRINSIC EVIDENCE TO AID CONSTRUCTION.

§ 567. **Admission of Extrinsic Evidence in General; Rule applied to Wills.**—We are now to consider how far extrinsic evidence is admissible to aid in the construction and interpretation of wills. In modern times, when the codes and policy of England and the United States harmonize in requiring not only that wills—whatever the description of property to which they relate—shall, with trivial exceptions, be expressed in writing and embodied in some instrument which has been signed and witnessed with due solemnity, we may well expect to find parol testimony of what the maker really intended, and, indeed, all proof *dehors* the testamentary paper or papers more carefully shut out than formerly. The maxim hardens into a truism, that the will must speak for itself, that the testament shall afford its own testimony. Hence, the modern interpretation of wills becomes subject to rules much the same as apply to contracts; and eminent jurists assert that there is no material difference of principle between the two classes of writings, except what naturally arises from the different circumstances of the parties.¹

Yet in those differing circumstances appears no little ground of variance; for here, instead of parties who balance their interpretation together of what was mutually intended, and may enlarge, qualify, explain, or rescind provisions at pleasure, changing the original document and adding new writings if they so incline, we find a formal instrument or instruments of disposition left as a sort of chart to all posterity, whose operation has no element of mutuality, whose maker cannot aid a court to discern his meaning, whose language and effect, however harsh, must remain immutable and unyielding to the end of time. Interpretation consequently

¹ 1 Greenl. Ev. § 287.

is thrown upon the judicial tribunal itself, which must hold the scales between the rival interests which this irrevocable disposition has stirred up, and discharge a sacred duty both to the dead and the family and relations one leaves behind. In order to discharge these delicate functions safely and honorably, the court seeks therefore to put itself in the testator's place, and read, through his own surroundings, the disposition of property as he made it; to discover, not as in contracts, the meeting of two minds, but the process worked out and expressed by one individual mind and one will. It repels, however, on the one hand, the perilous discretion of framing another will, something different from that presented, whether better or worse; on the other, it shuns the equal danger of ignoring or perverting the rights of those interested under the will, by treating the instrument too much as though it were some generic thing, a document, a product, without an individual author. On the whole, the court puts the will, if possible, as the testator meant it, or, at least, clearly enough expressed it, and there rests. Hence this tender indulgence to the testator's wishes already commented upon, this straining to discern, through the mists of careless, untechnical, and ignorant expressions, that pole-star of intention by which construction must be guided. And hence, too, as we shall now endeavor to show, the judicial inclination, when that intention remains obscured, in spite of rule or presumption brought to bear upon the instrument by way of interpreting it, is to borrow light from extrinsic circumstances and illumine its meaning.

§ 568. **Extrinsic Evidence to control, contradict, etc., Inadmissible.**—We may lay it down, then, at the outset, that where the language employed in the will is clear and of well-defined force and meaning, extrinsic evidence of what was intended in fact cannot be adduced to qualify, explain, enlarge, or contradict this language, but the will must stand as it was written.¹ Courts, we have seen, are well enough

¹ 2 Stra. 1261; Goss v. Lord Nugent, Chambers v. Minchin, 4 Ves. 675; Canfield v. Bostwick, 21 Conn. 550; Brown Wigram Wills, 5; 1 Jarm. Wills, 409; 1 Greenl. Ev. § 290; v. Saltonstall, 3 Met. 426.

disposed to correct the letter of such an instrument by its spirit; to overlook verbal errors and infelicities of expression, transpose phrases, and mould the language somewhat to meet the testator's obvious meaning.¹ But to go a step beyond this and insert or substitute in effect that which the will never contained, our courts have stubbornly refused, and decline, to their honor, the insidious temptation of shaping men's wills for them.² Far safer is it, as they deem it, to adhere to general limits prescribed by general rules.³ And if written testimony *dehors* the will should be rejected from this point of view, much more should be that looser and less credible parol proof which is purely oral.

To cite a few examples. A very early case discarded letters and oral declarations of a testator to prove that he meant to include a reversion in words whose formal expression would not bear that construction.⁴ Another and a leading case refused proof from the person who drew the will, that a release of debt due from one of the residuary legatees should have been inserted.⁵ And, generally speaking, words or a provision inadvertently omitted from a will cannot be supplied in construction:⁶ though what is superfluous by way of error may perhaps be expunged when the will is probated, so that the instrument may stand as what the testator supposed himself executing.⁷ Nor are plain words to be read differently or changed upon any plea, however capable of proof *aliunde*, that the testator meant different words; especially

¹ *Supra*, § 477.

² "For it would have been of little avail," as Mr. Jarman forcibly observes, "to require that a will *ab origine* should be in writing, or to fence a testator round with a guard of attesting witnesses, if, when the written instrument failed to make a full and explicit disclosure of his scheme of disposition, its deficiencies might be supplied, or its inaccuracies corrected, from extrinsic sources." 1 Jarman. Wills, 409.

³ "I agree in the necessity of adhering to general rules in the construction of wills and other instruments. It is expedient that such rules should be held

sacred; because they withdraw the decision from the discretion of the individual judge, and prevent him from pursuing his own views of each particular case. And there is less inconvenience in the hardship which may sometimes be occasioned by a strict adherence to the rule, than in the confusion which must follow on departing from it." Tindal, C. J., in 7 Bing. 279.

⁴ *Strode v. Lady Falkland*, 3 Ch. Rep. 98.

⁵ *Brown v. Selwin*, Cas. t. Talb. 240.

⁶ *Supra*, §§ 216-218.

⁷ *Supra*, §§ 219, 220.

if the effect would be to alter the disposition from that expressed in the instrument: as, for example, where it is claimed that a legacy of \$500 was wrongly written for \$5000, or that all the rest "of my estate personal" is said to have intended "of my estate real and personal";¹ while on the other hand a clerical error apparent from the context might be corrected in construction without the need of external proof at all.²

§ 569. **The Same Subject.** — In short, extrinsic evidence is incompetent to show the intention of a testator where the will speaks for itself with a clear and unambiguous meaning;³ nor can it be received to show a different intention from that which the instrument discloses; nor can it enlarge or diminish by construction the disposition as written out and executed,⁴ or supply any omissions or defects which may have occurred through mistake or inadvertence. Were it possible that alterations or insertions had been made in the original instrument after its execution without the testator's knowledge and consent, or that some fundamental error prevented him from executing the right instrument, this would have afforded ground for amending or rejecting the will in probate, upon proper evidence of the facts,⁵ and the intervention of equity to correct such mistakes is to be cautiously exercised;⁶ but taking the instrument as probated and supposing it to be that which the testator and his witnesses solemnly executed, no court of construction can change its tenor or tamper with its definite expression. That which a testator executes as his will must so operate, notwithstanding his mistake of law;⁷ nor can it be set up from drafts, from

¹ *Supra*, § 527; *Graham v. Graham*, 23 W. Va. 36. And see *Newburgh v. Newburgh*, 5 Mad. 364.

² *Supra*, § 527. A will cannot be contradicted as to the amount stated of an advancement to be brought into hotchpot. *Wood Re*, 32 Ch. D. 517.

Evidence that the testator said, before executing his will, that he intended to give certain property to the plaintiff

was ruled out in *Patterson v. Wilson*, 101 N. C. 594.

³ *Mackie v. Story*, 3 Otto, 589; *Clark v. Clark*, 2 Lea, 723.

⁴ *Wilkins v. Allen*, 18 How. 385; *King v. Ackerman*, 2 Black, 408.

⁵ *Supra*, §§ 214-220.

⁶ *Supra*, § 220.

⁷ *Supra*, § 275.

contemporaneous memoranda, or even from the direct testimony of one's own scrivener or copyist, still less that loose hearsay which is always untrustworthy, that one mistook in fact what was written out. For if competent to make his will and executing the instrument freely and intelligently as his own, a testator must be taken to have adopted the contents as his own, and nothing surely can prevent a person from doing so at the last moment or silently; and it is to guard the instrument as an authentic disposition that the writing, the signatures and the attestation, all are required at the present day.

But what courts of construction can and will do, our two preceding chapters have indicated. They take the instrument as a whole and bring all parts, all provisions, together, and try to discover the general meaning without resort to any proof *aliunde*; they bend the lesser sense to the larger; and the intent thus discerned through the probated writing as a whole, aided by rules of presumption, shapes their interpretation of the instrument. If without other influences, other proof, a clear and unambiguous disposition is obtained, that disposition prevails; and should the testator's real intention be thereby frustrated, it is his own carelessly adopted or ill-chosen language that must answer for it.

§ 570. **Parol Evidence Inadmissible to change Rules of Construction, etc.** — Nor does it appear that sufficient ground is afforded for admitting parol evidence of one's intention when its purpose is essentially to control or qualify the general rules of construction, already stated at length.¹ Presumptions, or the *prima facie* effect and meaning of detached words and phrases, are controlled and modified readily enough by reference to the context and scope of the will without going outside the instrument at all, provided a clear conclusion is reached without external assistance. Words may be divested of their technical and literal force by this reference to the context;² but the court does not travel beyond the

¹ See cs. 1 & 2, *supra*.

² *Supra*, § 470. Thus the word "seisin" has been treated as meaning mere possession and not investing with the entire title. *Lucas v. Brooks*, 18 Wall. 436.

context needlessly for that purpose; and its discretion not to be further instructed ought to suffice. No extraneous writing which declares that one's will shall be construed according to its most obvious meaning without regard to technicalities can be used to swerve the court from its usual course of reference to the will alone.¹ No extrinsic evidence, oral or written, to show that the testator habitually or when he executed that particular will, used words in some peculiar, inexact, or popular sense, can be adduced for diverting words and phrases from the meaning which the language of the instrument affords unaided,² or even for confirming the court in its opinion of what was truly intended; supposing of course that an appropriate gift is found in the will itself which makes good sense when applied to its surroundings.³

§ 571. Meaning of Words interpreted by Will; Punctuation, etc. — As we have shown,⁴ it is the expressed intention of the testator, that which his will imports, and not any conjectural intention of his outside of the will which might or might not be capable of demonstration, that the court relies upon; and having ascertained that expressed intention to its satisfaction, the tribunal investigates no farther. Its conclusion may give words their technical or literal import, or may not; it may give expressions their ordinary and grammatical sense, or may not; but the meaning settled upon, if settled intel-

¹ *Sullivan v. Winthrop*, 1 Sumn. 1.

² 4 Dow, P. C. 65; *Eberts v. Eberts*, 42 Mich. 404; *Brown v. Brown*, 11 East, 441; *Shore v. Wilson*, 9 Cl. & F. 558; *Mounsey v. Blamire*, 4 Russ. 384; 2 Jarm. Wills, 417; 1 Jur. N. S. 994; *Baker's Appeal*, 150 Penn. St. 590. Not even can a revoked will be looked at to influence the construction of the unrevoked and operating one. *Hughes v. Turner*, 3 My. & K. 666; *Bowes &c.*, W. N. (1889) 138. Nor a memorandum of what the testator declared between the making of his will and his death. *Thomas v. Lines*, 83 N. C. 191. And see 90 N. C. 597, 619.

³ Rules for the general construction of technical words have already been set forth. *Supra*, §§ 470-472. The legal effect of a remote gift to "grandchildren," which tends to perpetuity, is not to be controlled by showing that a woman is past the time of child-bearing. 39 Ch. D. 155.

In this connection the first three of Sir James Wigram's propositions concerning the use of extrinsic evidence (which are stated at length at the close of this chapter) are worthy of a reference. See *Wigram Wills*, pl. 21, 24, 51.

⁴ *Supra*, c. 1.

ligibly, is that which the words and language of the whole will properly interpreted convey *per se*.

Punctuation here has its use, though an ancillary one; and parentheses, stops, capital letters, and the like, may be taken into consideration when the will is not clearly interpreted otherwise.¹ But documents the most formal are apt to use punctuation marks, and commas especially, without much precision, the more so that the language of such writings is not that of every-day life; hence the bearing of such marks is circumstantial and not very positive; and punctuation of itself affords no ground for creating an ambiguity.²

§ 572. **Extrinsic Evidence, how far Admissible to resolve what is Doubtful.** — But all that has been said assumes the court to have reached something clear, sensible, and unambiguous as the result of a critical scrutiny of the instrument in all its parts, and after presumptions have been balanced and modified by a patient comparison of the context. All this scrutiny and comparison may leave the court nevertheless in doubt as to what the testator and the will intended upon some particular point in a given case; and hence, to resolve what is uncertain, but not to change or contradict what is plain, nor to substitute or insert new matter, the court admits extrinsic evidence of circumstances and surroundings in aid of the testator's meaning. And the object of such evidence is to put the court in the testator's place, and ascertain better what he intended.

It is this senseless or uncertain situation of things which the present chapter is more especially to deal with. But the extrinsic evidence of merely collateral facts and surrounding circumstances in aid of construction, we subordinate to another inquiry, deemed vital by modern courts, namely, how far evidence of what were the testator's actual testamentary intentions may be adduced to remove a doubt, and make the

¹ Hawkins Wills, 7, 8; Morrall v. Sutton, 1 Phill. 533; 2 Coll. 201; Child v. Elsworth, 2 D. M. & G. 679; 17 Beav. 591. ² See Arcularies v. Swett, 25 Barb. 406.

will operate with sense and consistency. In other words, we ask whether and in what instances one's instructions for his will, his memoranda, his declarations, oral or written, contemporaneous or otherwise, as to what he had done or meant to do by his will, and the like secondary proof may be set up in direct proof of his intention *dehors* the will itself, the written instrument, which embodies primarily his last wishes.

Another consideration here occurs; namely, that while a written will may speak sufficiently of the testator's purpose, that purpose has to be applied to definite persons and things. Doubt and uncertainty may arise out of this application of the gift, as in ascertaining sensibly the subject or object, or the interest given, whether lapse has occurred by a death, and so on.

§ 573. **Extrinsic Evidence in Aid of an Equivocal Description.**—In the first place, and most positively, extrinsic evidence of intention (or parol evidence, as it is often called¹) is admissible to determine which of two or more persons or things was intended under an equivocal description. As, for example, where a testator devises his manor of Dale, and it is found that he has two manors of that description; or gives a legacy to John Roe, and there prove two nephews, or a father and son, bearing that name.²

Instances in the reports under this head are numerous. As, for example, where a testator who made a bequest to "William Reynolds, one of my farming men," had in fact two persons of that name in his employ.³ And where the devise was to "John Cluer," and both father and son bore that name.⁴ And where a legacy was provided for the "Bible

¹ We use "parol" here simply to denote written or oral proof *dehors* the instrument, and not by way of contrast to "specialty," since a will is not of necessity an instrument under seal.

² *Miller v. Travers*, 8 Bing. 244; 1 Greenl. Ev. § 290; 2 Jarm. Wills, 430; *Wigram Wills*, 130.

³ *Reynolds v. Whelan*, 16 L. J. Ch. 434.

⁴ *Jones v. Newman*, W. Bl. 60. And

see *Morgan v. Morgan*, 1 Cr. & M. 235; *Gord v. Needs*, 2 M. & W. 129. The old reports suppose the case of a father having two sons, both baptized with the same name and both living at the time of the will, so that it may not be known who was meant without extrinsic proof. This illustration, though perhaps far-fetched, may serve. 5 Rep. 68; Hob.

32.

Society," there being more than one such society.¹ And evidence has been admitted to show that "my cousin Harriet Cloak" meant a cousin's wife, who bore that name, instead of a cousin whose Christian name was Harriet but whose surname had been changed by marriage;² and that where a residuary estate was given for equal division "between the Board of Foreign and the Board of Home Missions" (such Boards being found in various religious denominations) that the testator, being a zealous Presbyterian, intended the gift for Boards of the Presbyterian Church.³

§ 574. **The Same Subject.**—Extrinsic evidence may likewise, as it is often held, clear up a general uncertainty of description left in the will as to the thing given or the object of the gift, even though no alternative subject-matter or object is definitely presented at all. As, perhaps, in an English case, which has provoked much controversy, where a legacy was written out to Catherine Earnley, and it appeared in proof that there was no such person, but one Gertrude Yardley (commonly called Gatty), for whom it had been doubtless meant, as the will was written from dictation by a scrivener who mistook the name when the testator pronounced it in a low and feeble voice, and wrote by the sound.⁴

And where, again, the description of the property or the person is partly wrong and partly right, but sufficiently right for a basis of identity; as in a bequest to "Sophia Still, the daughter of Peter Still, of Russell Square," who had two daughters, neither of whom bore that name, but one was Selina.⁵ And, generally speaking, where the gift is to a person whose surname or Christian name (but not both) is mistaken; or whose description is imperfect or not wholly accurate. For here *falsa demonstratio* is stricken from the will by construction, and extrinsic proof is sought to supply the full intent, not to change or create an intent. And thus

¹ Tilton v. American Bible Society, 60 N. H. 377. Evidence that an annual contribution was taken for one of them in the testator's church is competent on this point. *Ib.*

² Taylor *Re*, 34 Ch. D. 255.

³ Gilmer v. Stone, 120 U. S. 586.

⁴ Beaumont v. Fell, 2 P. Wms. 140.

⁵ Still v. Hoste, 6 Mad. 192.

is it also when an estate is devised called A, and described as being in the occupation of B, when it is not wholly so occupied.¹ And a gift of "stock in the £.4 per cent annuities," has been taken as intended for "stock" in annuities of another description.² And a devise of land, correct in its general description, may be established by the correction upon extrinsic testimony as to what it describes in detail, or *vice versa*.³

The principle in this latter class of cases is, that where there is, in the main, a sufficient description in the will to ascertain accurately what is devised or bequeathed, a part which is inaccurate may be stricken out as surplusage, but that nothing substantial shall be added to the will.⁴ We have elsewhere mentioned other instances which are referable to the same head,⁵ and have shown that while the maxim holds good that a false demonstration does not injure, there is another maxim with which it sometimes conflicts, namely, that a court must gather the best interpretation possible from the whole will.⁶

"Equivocal description," in descriptions which are partly inaccurate, consists in this, according to English authority: that the inaccurate and rejected description applies to none of the persons or things in question, while the remaining description is equivocal with respect to them; but a description which is wholly inapplicable to any of the persons or

¹ Tindal, C. J., in *Miller v. Travers*, 8 Bing. 244; *Goodtitle v. Southern*, 1 M. & S. 299; 1 P. Wms. 286; *Cox v. Bennett*, L. R. 6 Eq. 422.

² *Selwood v. Mildmay*, 3 Ves. Jr. 306. Sir James Wigram doubts the authority of this case. *Wigram Wills*, pl. 131. "The case is certainly a very strong one," observes Tindal, C. J., in *Miller v. Travers*, *supra*; "but the decision appears to us to range itself under the head that *falsa demonstratio non nocet*, where enough appears upon the will itself to show the intention after the false description is rejected."

³ *Pocock v. Reddinger*, 108 Ind. 573;

Rogers v. Rogers, 78 Ga. 688; *Decker v. Decker*, 121 Ill. 341. *Cf.*, as to erroneous description, where the court will not go outside the will, § 518.

⁴ Tindal, C. J., in *Miller v. Travers*, *supra*. "An averment to take away any surplusage is good, but not to increase that which is defective in the will of the testator." *Anderson, C. J.*, in *Godb. Rep.* 131.

⁵ *Moreland v. Brady*, 8 Or. 303; *Black v. Richards*, 95 Ind. 184; *Drew v. Drew*, 28 N. H. 489; *Martin v. Smith*, 124 Mass. 111; *supra*, §§ 516-519, and cases cited; 1 Ch. D. 61.

⁶ *Supra*, § 517; 54 Penn. St. 245.

things in question cannot be equivocal, for here, when the accurate part of the description is rejected, nothing remains.¹

§ 575. **The Same Subject: Late English and American Cases compared.**— Later English precedents, dating from 1833, checked a growing disposition of the courts to admit parol proof of intention to correct a will, and took a conservative direction. On an appeal from the Vice-Chancellor in a case where one had devised to A all his real estate “in the county of Limerick and city of Limerick,” and proof was offered that he really meant by this “in the county of Clare and city of Limerick,” owning in fact lands in this latter county as well as in the city of Limerick, but none whatever in the county of Limerick, the order below favorable to this plea was reversed and proof of intention *dehors* the will utterly refused for changing what the will plainly enough expressed.² Cases of somewhat earlier date in the House of Lords had rejected parol proof that a devise of “my estate of A” meant to include estates elsewhere, as the testator used these words,³ or so as to insert a descriptive word which would have given the will a different purport from what its face expressed.⁴ In a case still later than any of these the court circumscribed still more closely the range of extrinsic proof to show what a testator intended.⁵ All of these decisions preceded the new Statute of Victoria.⁶ Sir James Wigram had already led in the remonstrance against the drift of some earlier cases, of which *Beaumont v. Fell* furnished a striking example;⁷

¹ Hawkins Wills, 11; *Miller v. Travers*, 8 Bing. 244; *Hiscocks v. Hiscocks*, 5 M. & W. 363; 1 Mer. 384.

² *Miller v. Travers*, 8 Bing. 244.

³ *Oxenden v. Chichester*, 4 Dow, P. C. 65.

⁴ *Newburgh v. Newburgh*, 1 M. & Sc. 352.

⁵ *Hiscocks v. Hiscocks*, 5 M. & W. 363 (1832).

⁶ See *supra*, §§ 252, 253; Appendix, *post*.

⁷ Wigram Wills, pl. 149-179. The justice of the decision in *Beaumont v.*

Fell, *supra*, § 574, can hardly be questioned, under the singular circumstances of the case, supposing, of course, the testator too feeble or illiterate to scrutinize carefully for himself what had been written out by another; and the similar sound of “Gatty Yardley” and “Catherine (or Katy) Earnley” as it strikes the ear, offers, possibly, one of those doubtful descriptions which a will may be said to afford of itself, so as to permit of further proof *dehors* the instrument, not so directly of intention, perhaps, as of the circumstances which

and the conclusion as stated by him is that extrinsic evidence of intent shall only be received where description is in terms applicable indifferently to more than one person or thing.

American cases do not seem always so strictly to confine the instances of doubtful description as Sir James Wigram and *Hiscocks v. Hiscocks* incline. Thus, where two parts of a description applied respectively to different properties, evidence of the testator's declarations was admitted to show what property he intended.¹ And it is held that if in a matter of description there is such a mistake that no one person or thing corresponds to the description in all particulars, but there is one who corresponds in many particulars, and no one other who can be intended, such person will take.² Latent ambiguities, so called, are resolved by the testator's declarations and other secondary proof of his intention when the will's own language does not suffice.³ The partially true description is treated as furnishing a case of equivocal description, as well as that where one or more persons or things answer the description.⁴ Where a testator gave all his "back land" to certain devisees, parol evidence was admitted to show what he intended by that term.⁵ And

surrounded its execution, the *res gestæ* of the act. Be this as it may, direct proof of intention is certainly objectionable where its effect is to establish orally some different disposition from what the will itself explicitly declares as written out and formally signed and witnessed. For where the description may apply indifferently to one or more objects the will describes, even though it does not clearly ascertain, and where the effect is to confine the language within one of its natural and appropriate meanings, the court merely rejects. Wigram Wills, 149-179. And courts may extend their indulgence so as to strike out a partial misdescription and leave the equivocal remnant to be identified.

We may add that the will in *Beaumont v. Fell* was made before the enactment of Victoria, which established solemnities of execution alike where

personal or real property was given by testament. And the Master of Rolls, though admitting the parol evidence to establish the legacy, observed that had it been a devise of lands, the utter misdescription of name would have made it void.

¹ *Doe v. Roe*, 1 Wend. 541.

² *Tucker v. Seaman's Aid Society*, 7 Met. 188, *per* Shaw, C. J.; *Howard v. American Peace Society*, 49 Me. 288.

³ *Cotton v. Smithwick*, 66 Me. 360; 76 Me. 527.

⁴ *Ib.* And see 4 Paige, 271; 3 Watts, 385; Bigelow's Am. Notes to 1 Jarm. 430, 431; *Allen v. Lyons*, 2 Wash. 475; *Winkley v. Kaime*, 32 N. H. 268.

⁵ *Ryerss v. Wheeler*, 22 Wend. 148. And see *Black v. Hill*, 32 Ohio St. 313. Where a power is given in a will to sell the testator's "speculation lands,"

in a recent Virginia case the will showed a legacy to a namesake of the testator described as "Samuel G. son of Captain John F. Slaughter"; there was no such person; but parol evidence was admitted to show that the testator meant by this "Samuel G., son of Captain John F. Hawkins."¹ These are a few among the many examples which American reports supply, to show how readily our own courts permit the rational intention of a testator to be aided by extrinsic evidence of what he meant, where the will as applied to a subject or object of description, raises some doubt which, if not resolved, must cause the testamentary provision to fail for uncertainty or senselessness.

§ 576. **Conclusion as to Extrinsic Proof of Intent in Case of Doubtful Description.**—The two classes of cases, then, in which direct evidence *dehors* the will appears admissible to show the testator's intention, are these: (1) Where the person or thing, the object or subject of the disposition, is described in terms which are applicable indifferently to more than one person or thing. (2) Where the description of the person or thing is partly correct and partly incorrect, and the correct part leaves something equivocal.² Or, perhaps, to take a broader view of the subject, extrinsic evidence of intention may be admitted wherever the instrument is insuf-

parol evidence may identify these lands. *Brown v. Brown*, 106 N. C. 451. And where a bequest is made to A, "in addition to what I have already given him," the sums represented by notes which appear among assets of the estate, may be shown as the gift in question. *Dougherty v. Rogers*, 119 Ind. 254. And see *Scott v. Neeves*, 77 Wis. 305. Parol evidence may identify land not clearly described, which is the subject of devise. *Jones v. Quattlebaum*, 31 S. C. 606.

¹ *Hawkins v. Garland*, 76 Va. 149. The court here relied upon the English case of *Beaumont v. Fell*, *supra*. See also *Taylor v. Tolen*, 38 N. J. Eq. 91. Extrinsic evidence is admissible to show

that a legacy, which appears on the face of the will to be general, was intended to be specific. *Hastings Re*, 6 Dem. 307.

² *Miller v. Travers*, 8 Bing. 244.

Sir James Wigram appears to narrow the proposition down. *Wigram pl. 194*. So, too, does the language of the court in *Hiscocks v. Hiscocks*, *supra*. But this is not justified by the precedents we have cited. And see *Tindal, C. J.*, in *Miller v. Travers*, 8 Bing. 244. See also *Baird v. Boucher*, 60 Miss. 326, as to "rent and personal" property; also *Northern's Estate Re*, 28 Ch. D. 153. The policy being a just one, it should receive a just and liberal interpretation.

ficiently expressed or applied in terms so as to raise a doubt of the object or subject intended, and in order to give the disposition effect, that doubt must be cleared and the insufficiency supplied. On the other hand, such extraneous proof should be ruled out, whenever its tendency is to establish an intention different in essence from what the will expresses on its own face; for where admissible it is in aid of the testator's expressed intention, not against it.

In cases of this kind, moreover, the meaning of the testator's words is not usually ambiguous or obscure on the face of the will, but from some of the facts and circumstances admitted in proof an ambiguity arises as to applying the disposition which the will sets forth. The evidence adduced creates no gift but simply directs it.

§ 577. **Reference to Context in Equivocal Description.**—An apparent uncertainty of description of this sort is sometimes cleared, moreover, wholly or in part by reference to the context of the will itself; as where the testator devises one piece of land to A. B. simply, and another piece to A. B. of Malden, having two nephews of the same name, one of whom dwelt at Malden and the other elsewhere; for here the presumption arises, both having equal claims as natural objects of the testator's bounty, that the Malden nephew and the other were thus distinguished, and evidence of intention *aliunde* may be restrained in admission or refused altogether,¹ to resolve the doubt which the circumstances and situation of the testator's family and property had suggested. So a devise or bequest to William Marshall *simpliciter* is taken more naturally to apply to one of that simple name than to one William J. R. B. Marshall,² and to Miss S. to import the eldest of the daughters rather than any other younger one:³ though the description being equivocal, in either instance parol proof of intention might be let in, as it always may in such cases where the evidence from the context is not conclusive.

¹ Morgan v. Morgan, 1 Cr. & M. 235; Gord v. Needs, 2 M. & W. 129; Westlake v. Westlake, 4 B. & A. 57.

² Bennett v. Marshall, 2 K. & J. 740.

³ Lee v. Pain, 4 Hare, 249.

§ 578. **Extrinsic Proof cannot aid to misconstrue.** — On the other hand, it cannot be shown by extrinsic proof that when the testator devised the manor of Dale he meant to give another manor bearing a totally different name; nor that by John Roe he intended Peter Doe, quite a different personage; and the utter failure of the devise or legacy in consequence, because no such land or no such personage can be identified as that described, affords no sufficient reason, according to the better opinion, why the court should create a gift in different terms.¹

Hence parol evidence of intent cannot be admitted to supply possible omissions or defects in a will occurring through mere mistake or inadvertence, nor should a court, for any assumed purpose of correcting the instrument by proof *aliunde* of what the testator actually intended, change a description which is wholly inapplicable to subject or object, as it stands written, into a corresponding gift, especially if the words are clear, and have a definite meaning of their own. Thus, where one gives a legacy to the "Seaman's Aid Society," and a society actually exists by that name, it cannot be shown that the testator intended another society, namely, the "Seaman's Friend Society"; and proof that the testator knew nothing of the existence of the former society, that he subscribed regularly to the latter, frequently spoke of giving it a legacy, took a deep interest in its welfare, and gave directions for his will to the scrivener, who, through mistake, wrote the wrong name in the instrument, is accordingly rejected.²

Moreover, provisions apparently conflicting which are contained in the will itself, repugnant parts, and whatever ambiguity may arise directly from the face of the instrument and the expressions, must be resolved, if at all, by construction, and not by external proof of what was intended.³ Hence

¹ See 1 Greenl. Ev. § 290; Miller v. 7 Met. 188. And see 8 Md. 507; 15 Travers, 8 Bing. 244; Oxenden v. Chichester, 4 Dow, P. C. 65; 1 M. & Sc. 352; Hiscocks v. Hiscocks, 5 M. & W. 363; *supra*, § 568.

² Tucker v. Seaman's Aid Society,

³ Tucker v. Seaman's Aid Society,

the declarations or instructions of the testator to the person who wrote the will must be excluded in this connection.¹ The patent contradiction in terms of a will may sometimes be rendered harmless by a generous construction, but never by parol extraneous proof of what was intended.²

But by all this is meant, not that the description in the will should be altogether accurate and perfect, but that it must be so far accurate and perfect as to describe the subject or object of the gift with legal certainty;³ so that the particular specific doubt once removed, the court may conclude with confidence that the intention of the will is carried out, and not some intention inferred outside of it, or what, from the will's own expression, was no consistent intention of any kind. For "if the description of the person or thing (to use Sir James Wigram's language) be wholly inapplicable to the subject intended or said to be intended by it, evidence is inadmissible to prove who or what the testator really intended to describe";⁴ which is equivalent to repeating what we have so often remarked, that the court is not to set up by parol evidence a different will from that which the testator himself expressed and executed.

§ 579. **Extrinsic Proof of Facts and Circumstances, not of Intention, how far Admissible.**—Direct proof *dehors* the will of what the testator actually intended is what we have shown the courts so chary of admitting, and this out of deference to the Statute of Frauds and other legislation of later date, which require wills to be written out and duly executed. But to aid the context of the instrument by extrinsic proof of the circumstances and situation of the testator when it was executed, is constantly permitted at the court's discretion, and this constitutes a proper, indeed, often an indispensable matter of inquiry when construing a will. For, whatever a will may set forth on its face, its application is to persons and things external; and hence is admitted evidence outside the instru-

supra; Mann v. Mann, 1 Johns. Ch. 231; Lewis v. Douglass, 14 R. I. 604; Brearley v. Brearley, 1 Stockt. 21.

¹ Lewis v. Douglass, *supra*.

² See 3 Fost. 46.

³ See Wigram Wills, pl. 186.

⁴ Wigram Wills, pl. 188.

ment of facts and circumstances which have any tendency to give effect and operation to the terms of the will; such as the names, descriptions, and designation of beneficiaries named in the will, the relation they occupied to the testator, whether the testator was married or single, and who were his family, what was the state of his property when he made his will and when he died, and other like collateral circumstances. Such evidence being explanatory and incidental is admitted, not for the purpose of introducing new words or a new intention into the will, but so as to give an intelligent construction to the words actually used, consistent with the real state of the testator's family and property; in short, so as to enable the court to stand in the testator's place, and read it in the light of those surroundings under which it was written and executed.¹ For it is produced to prove facts which, in the language of Lord Coke, "stand well with the words of the will."²

¹ See Tindall, C. J., in *Miller v. Travers*, 8 Bing. 244; *Lowe v. Huntingtower*, 4 Russ. 581; *Tucker v. Seaman's Aid Society*, 7 Met. 188, *per* Shaw, C. J.; *Blake v. Hawkins*, 98 U. S. 315; *Postlethwaite's Appeal*, 68 Penn. St. 477. See also *Wigram Wills*, pl. 59-95. Even the fact that the will was written out by the testator, he being an unprofessional man and unaccustomed to precise expression, has been thought not unworthy of consideration. 2 Bush, 171.

² 8 Rep. 155. Parol evidence may be adduced for showing the state of the testator's property when he made the will. *Hyde v. Price*, 1 Coop. 208; *Brainerd v. Cowdrey*, 16 Conn. 1; 1 Jarm. Wills, 422, and Bigelow's note; *Marshall's Appeal*, 2 Penn. St. 388; 108 Ind. 573. Or to show the state of his family. 2 Jones Eq. 420; *Rewalt v. Ulrich*, 23 Penn. St. 388. Or other facts known to the testator which may reasonably be supposed to have influenced the particular disposition. 2 Pick. 243, 460; *Wootton v. Redd*, 12 Gratt. 196.

In pronouncing for a liberal admission

of extrinsic facts and circumstances to aid in discovering the intention, Sir James Wigram strongly insists upon his distinction between the application of evidence to explain a testator's words, and its application to prove intention as an independent fact. "The evidence for the admissibility of which we are now contending," he continues, "is of the former description. It does not *per se* approach the question of intention. It is wholly collateral to it. It explains the words only by removing the cause of their apparent ambiguity, where in truth there is no real ambiguity. It places the court which expounds the will in the situation of the testator who made it, and the words of the will are then left to their natural operation." *Wigram Wills*, pl. 76.

Among other considerations why extrinsic circumstances should be resorted to is the fact that the same words, properly interpreted, will often mean different things under different circumstances. *Wigram*, pl. 77. See U. S. Dig. Wills, 1554-1571.

How wide may be the range of such testimony a moment's thought will convince us. Hardly a disposition informally drawn can a will contain, where parol proof of circumstances, and much of it scarcely relevant, has not been adduced, with a court's sanction, to aid in construing the instrument. The main object is to discover, of course, the testator's intention, and in order to do so, the court reads the will carefully over as he executed it, collecting his intention from his words; but as words in every will, whether well or ill employed, refer to facts and circumstances respecting the testator's property, and his family, and others whom he names or describes therein, the true meaning and application of those words cannot be ascertained without proof of all those facts and circumstances.

Agreeably to this doctrine, a court may look beyond the written will itself and be guided in its construction, not only where the object or subject of the gift is in dispute, but where the estate or quantity of interest given is not clear upon the face of the will.¹ The will is often thus aided and reconciled in construction, though not, of course, contradicted; nor is such proof admitted at all if the simple writing be sufficiently understood without it. For where there is nothing equivocal or uncertain in the language of the testamentary instrument, proof of the circumstances surrounding the testator remains unimportant and hence inadmissible as well as proof of what he actually intended.²

§ 580. **The Same Subject.** — If direct extrinsic proof of the testator's intention may be offered to clear up equivocal description under the will,³ indirect evidence, or such as explains the testator's circumstances, habits, and manners, is *a fortiori* admissible besides. And even in cases where the stricter rule must exclude the testator's drafts, his instructions, and declarations, before or after the act of execution, of what he intended to give, evidence of extrinsic circum-

¹ *Lowe v. Manners*, 5 B. & Ald. 917; ³ *Supra*, § 573; *Wigram Wills*, pl. 8 Bing. 244, 323; *Wigram Wills*, pl. 90. 59-95.

² *Wells Re*, 113 N. Y. 396.

stances is not forbidden to aid in a just interpretation. Such a distinction may seem a strange one; for this very proof of circumstances, especially when it leads closely up to the act of execution and its surroundings, may fall scarcely short of proving in fact what the testator actually meant, outside the written authentic expression of his last wishes.¹ Nevertheless, the distinction is tenable, and much insisted on; and a court of construction may check oral proof which comes too near to the *factum* of execution, forbidding issues to be reopened which the probate once settled, or which can only be brought up in equity when its jurisdiction to correct mistakes is openly invoked.

But the evidence here sought or permitted is in aid of conclusions which the will itself justifies, but does not make quite clear in expression or application. Direct evidence of intention alone, that which would prove intention as an independent fact, virtually repeals the wills act and supersedes the well-considered policy of our law; and it is against the admission of extrinsic testimony, to show independently what one intended, that the line is drawn.

Many of our American cases are of less force as precedents, because they fail either to announce this distinction or to positively reject it. They lay down the general maxim that parol evidence is admissible in all cases of latent ambiguity, such as misdescription; but whether by this they mean direct evidence of the testator's intention, or nothing more than proof of surrounding circumstances, of the testator's property, his family, and the like, they do not clearly specify.²

§ 581. **Latent and Patent Ambiguities in this Connection.**—Much has been said of latent and patent ambiguities in this connection; an expression borrowed from Lord Bacon, whose oft-quoted canon, though Wigram and other good English

¹ *Beaumont v. Fell*, 2 P. Wms. 140, cited *supra*, § 574, is a case in point. The *res gestae* of the execution being admitted, it hardly needed any direct proof that the testator had declared his intention at other times to provide for

the claimant, to establish her case. And see *Patterson v. Wilson*, 101 N. C. 594.

² *Winkley v. Kaine*, 32 N. H. 268; 2 Wash. 475; 2 Dana, 47; *Hawkins Wills*, 9, *Sword's note*; 66 Me. 360.

writers have disputed it,¹ the courts do not seem quite ready to discard. This canon regards ambiguities of words as of two sorts, — patent and latent ; the one where the instrument appears ambiguous, the other where collateral matter out of the instrument breeds the ambiguity, since the instrument on its face appears certain enough.² In a patent ambiguity the written instrument, or higher proof, cannot be mingled in proof with the lower or oral, and must be construed by its own terms ; but a latent ambiguity (which in truth grows out of the application of the language to facts and circumstances) is raised by matters parol, and hence may be fairly removed by the same means.³ But, applying this rule to a will, we shall presently find that writings of that character, which would be ambiguous (or rather uncertain) on their face without oral explanation, admit often of such explanatory proof to make their meaning obvious ; while, on the other hand, as we have just seen, the latent ambiguity may indeed be aided, but whether alike by merely explanatory proof, or by direct proof of intention, is another matter. And, again, by ambiguity the idea is conveyed that words are capable of more senses than one ; but the use of extrinsic evidence must be taken in a broader sense, and applied where the instrument points at no certain intention at all, where it is insensible, so to speak, unless this borrowed light is thrown upon it. The argument, moreover, derived from mingling proof of the higher and lower or equal quality is rather fanciful and misleading for employment in our age, ante-dating, as it does, the legislation of the last two centuries, which inspires our modern policy of written, signed, and attested wills. Lord Bacon's illustrations were good, but practice carried the force of his rule beyond his own examples ; and his distinction of patent and latent, though convenient in some respects, can hardly serve as a criterion.⁴ For, in every case, as Mr. Jarman has truly observed the judge by whom a will is to be

¹ Wigram Wills, pl. 196; 1 Jarm. Wills, 429, 430.

² *Ib.*; Bac. Maxims, rule 23.

³ *Ib.*

⁴ See Wigram Wills, pl. 196-210, where some of the above objections are stated and others adduced.

expounded is entitled to be placed, by a knowledge of all the material facts of the case, as nearly as possible in the situation of the testator when he wrote it.¹

§ 582. **Extrinsic Proof of Custom and Usage; Deciphering, Translating, etc.**—Since all writings are insensibly colored by the manners, ideas, and institutions of the age which produces them, parol evidence is admissible of particular customs and usages, whenever the nature of the case demands such knowledge in order that the will may be correctly interpreted.²

Where, again, the will is written in characters not easy to decipher, or in a language which the court does not understand, the evidence of persons skilled in deciphering or translating is admissible to aid the sense of the testator's own expression.³

On the same principle, any obscure terms common to a calling with which the testator was familiar, or his shorthand, cipher, or other peculiar modes of expression, may be explained by the evidence of others competent to enlighten the court, and his symbolic writing thus reduced to its rational and consistent meaning.⁴

§ 583. **Misnomer, Nickname, etc., corrected; Subject or Object of Gift identified.**—Illustrations of the preceding principles may be multiplied, as in the case of a misnomer, or nickname. A strong reason for admitting extrinsic proof of an explanatory sort in these exceptional instances of doubt-

¹ 1 Jarm. Wills, 430.

² *Supra*, § 469; 1 Jarm. Wills, 421; Wigram Wills, pl. 94; *King v. Mashiter*, 6 Ad. & E. 153. The rule is the same as applied to other instruments in writing. 2 Phil. Ev. c. 7, § 3, 9th ed.

³ Wigram Wills, pl. 56; *Norman v. Morrell*, 4 Ves. 796; 9 Cl. & Fin. 502; 1 Jarm. Wills, 421.

⁴ Thus in *Kell v. Charmer*, 23 Beav. 195, the testator, a jeweller, used the private price-marks of his business; and the letters "ixx" were explained to mean £100.

"The testator may have habitually called certain persons or things by peculiar names, by which they were not commonly known. If these names should occur in his will, they could only be explained and construed by the aid of extrinsic evidence to show the sense in which he used them, in like manner as if his will were written in cipher or in a foreign language. The habits of the testator in these particulars must be receivable as evidence to explain the meaning of his will." Lord Abinger, in *Hiscocks v. Hiscocks*, 5 M. & W. 363.

ful description is, that otherwise the gift must fail for want of a sufficient subject or object, that absurdity or nullity is the inevitable outcome of non-admission. A testator who has taken the pains to express his last wishes in writing, most probably meant something; and to conclude that he intended a provision illegal or inoperative, is more natural than to conclude that he intended nothing at all. Hence, the anxiety of our courts to discern a rational meaning, if they can, in what the will bestows, rather than pronounce the disposition void for uncertainty, where any proof, not open to the fundamental objection against disputing solemn instruments in writing by parol evidence, is available. In various ways does this desire to give the instrument a consistent meaning influence the decisions. As, for instance, in treating a residuary devise of all the testator's real estate as carrying a power to appoint real estate where the testator had such a power but no real estate at all.¹ So, too, under the general rules of construction, in holding to no presumed intention, but overturning the presumption wherever it appears that unless the testator meant differently his gift amounted to nothing.²

In various instances courts have, moreover, saved a devise or legacy from failure by admitting, if not direct proof of intention, at least evidence of the extrinsic sort which bears in that direction, though literally explanatory of the testator's situation and circumstances, and with the avowed object of identifying rather the subject or object of the gift. The court interprets by the testator's familiar symbols, his habitual though perhaps obscure, imperfect, or inaccurate modes of expression. Thus, the mere misnomer of a legatee or devisee does not render the gift void, if from the context of the will or proof of the admissible sort *dehors* the instrument it can be ascertained who was actually intended.³ Persons designated by their nicknames, too, or by words of misde-

¹ *Standen v. Standen*, 2 Ves. Jr. 589. 6 Ves. 42; 19 Ves. 381; *Cook v. Danvers*,

² See c. 2 *passim*, where this idea 7 East, 299; *Smith v. Smith*, 4 Paige, 271; *Taylor v. Tolen*, 38 N. J. Eq. 91; 42 N. J. Eq. 43.

³ 1 Jarm. Wills, 380-383; Amb. 175;

scription originating in some nickname, or by their popular names, or by some familiar term of endearment, may also be identified.¹ So, too, may a name assumed or gained by reputation, though not strictly appropriate, amount to a sufficient description of the person intended.² Nor need a legatee be expressly named at all if oral proof of identity serves to connect him with the gift which the will expresses.³

Extrinsic evidence of facts and circumstances may clear a doubtful bequest to some society or corporation, especially a charitable one, whose name is not well described, thus identifying the proper recipient of the bounty.⁴ So, too, with the thing which is given, evidence of the circumstances may serve to identify the property and save the gift; as where, for instance, a certain section of land is devised without mention of the state or county.⁵ Nor is the popular and reputed locality of the gift or that familiar to the testator to be controlled by proof that his description was not literally correct.⁶ A debt referred to in a will as "N's debt," may be identified by extraneous evidence as one which the testator thus styled but which was really the debt of another for whom N acted as agent.⁷

In short, whatever devise or bequest may possibly be reduced to a certainty, or in substance identified as it was meant, without violating a cardinal rule of evidence, will be upheld.⁸ And in such cases the careless and unskilful

¹ Lee v. Pain, 4 Hare, 251; Sutton v. Cole, 3 Pick. 232; Beatty v. Universalist Society, 39 N. J. Eq. 452.

² Hob. 32; Queen's College v. Sutton, 12 Sim. 521; Tambl. 316; Vermont Baptist Convention v. Ladd, 59 Vt. 5.

³ Cheney v. Selman, 71 Ga. 384. Thus, in a gift to "members of my family," or the "children of A." *Ib.*; Hill v. Bowman, 7 Leigh, 650.

⁴ Kilvert's Trusts, L. R. 7 Ch. 170; Hinckley v. Thatcher, 139 Mass. 477; 3 Demarest, 516; 49 Me. 288; 66 Me. 100; Straw v. East Maine Conference, 67 Me. 493; 7 Met. 416; Gilmer v. Stone, 120 U. S. 586; Smith v. Kimball, 62 N. H. 606.

⁵ Black v. Richards, 95 Ind. 184. See Wood v. Hammond, 16 R. I. 98.

⁶ Anstee v. Nelms, 1 H. & N. 225; § 575.

⁷ Scott v. Neeves, 77 Wis. 305.

⁸ Upon the general subject of uncertainty in a gift, see next c.

See *supra*, §§ 516-518. A mistake in the locality of lands devised may often be aided by words of reference to occupancy, and *vice versa*, or other identifying terms. 1 Jarm. Wills, 377; 1 Ld. Raym. 728. And so, too, where leasehold is described as freehold, etc. Scrupulous exactness of description is not needful, if identity under the will can be safely established, despite all error

testator who draws his own will without competent advice finds bountiful indulgence from the courts; his written expressions being smoothed out, words which he left out or misapplied being supplied or read correctly, and the main intention gathered and carried out if possible.¹ Wherever, in fine, there remains no reasonable doubt as to the person or thing intended to be described, upon due investigation, the gift will not be disappointed; and thus may a gift be sustained, though in point of fact no beneficiary answered to the literal expression of the will.

§ 584. **Blank in a Will: Omitted Gift not inserted.**—Where a complete blank is left in the will for the name of a legatee or devisee, no parol evidence, however strong, is competent to fill it up;² and the principle appears to be the same where the blank relates to the subject or thing bequeathed or devised. To give “to — \$1000” leaves, therefore, no one who can claim the legacy; and to give “to AB —” leaves nothing to be claimed as a legacy; and in either case the testator likely enough never resolved upon a gift definitely, though turning it over in his mind, as to the subject or object.³

But partial blanks may, in a suitable case, be supplied in construction, not, perhaps, by direct parol evidence of what the testator intended, but, at all events, where the context, with or without the aid of extrinsic circumstances, supplies a definite thing or person, and renders the will sensible. Thus, a legacy to “Mr. B,” or to “John,” or to “Brown,” might be identified;⁴ and so, too, where one legacy of \$500 was given to A, and another of \$700 to B, a third legacy of “600” to C might well be supposed to mean six hundred dollars. Upon partial blanks, on the other hand, which leave the

or imperfection in the will's expression. “*Veritas nominis tollit errorem demonstrationis*”; that is to say, where some one answers the name, it is immaterial that a further description does not precisely apply. See 1 Jarm. Wills, 379; 2 Ves. Jr. 589. On the other hand, “*nihil facit error nominis cum de corpore constat.*”

¹ Lytle v. Beveridge, 58 N. Y. 592.

² Hunt v. Hart, 3 Bro. C. C. 311. See next c.

³ Miller v. Travers, *supra*; 2 Atk. 239; Taylor v. Richardson, 2 Drew. 16; 1 Jarm. Wills, 441.

⁴ See 3 Ves. 148; De Rosaz *Re*, 2 P. D. 66.

sense defective, no valid gift can be based.¹ And if, besides a blank, there is an uncertain description, the will becomes doubly inoperative.²

Moreover, a devise or bequest, wholly omitted by mistake, is not to be inserted in a will;³ yet some partial omission might not exclude a sensible construction of the gift, with the aid of extrinsic circumstances.

§ 585. **Devise or Bequest to Children, etc.**—Inasmuch as a gift need not be to persons by name whose identity can be established, a gift to the “children of A” sufficiently describes them.⁴ And the word “children” has its own natural interpretation;⁵ so that the proof of intent *dehors* the will is inadmissible to show that a will thus plainly expressed was meant to signify sons and to exclude the daughters,⁶ or *vice versa*. As to omitting the name of one’s own child from his will, various enactments are found in our local codes, whose policy upholds more or less conclusively the right of such child to take his share in the estate.⁷ Evidence *dehors* the will that the testator intended the omission and meant in fact to disinherit the child cannot, under some of these enactments, be received at all;⁸ but other statutes permit such parol proof to be offered so as to repel the inference from the will that the omission was accidental; excluding neither direct nor indirect evidence upon this point.⁹

§ 586. **Parol Evidence to prove or repel a Resulting Trust.**—Courts of equity have in some instances admitted parol evidence not only in the cases of fraud and error elsewhere considered,¹⁰ but so as to establish or repel a resulting trust. Thus, where a devise or bequest is procured from the testator

¹ *Mason v. Bateson*, 26 Beav. 404.

² *Traylor’s Estate*, 81 Cal. 9; § 592.

³ *Newburgh’s Case*, 5 Madd. 364.
And see *supra*, §§ 216–219.

⁴ *Cheney v. Selman*, 71 Ga. 584.

⁵ *Supra*, § 533, where the primary and secondary meanings of this word are stated. Such words as “son,” “child,” “daughter,” etc., must usually be construed in the primary sense, unless

that would make the will insensible and absurd.

⁶ *Weatherhead v. Baskerville*, 11 How. 329.

⁷ *Supra*, §§ 20, 480.

⁸ *Garraud’s Estate*, 35 Cal. 336.

⁹ See *Lorings v. Marsh*, 6 Wall. 337; *Buckley v. Gerard*, 123 Mass. 8; 3 Gray, 367; 106 Mass. 320; 5 Iowa, 196.

¹⁰ *Supra*, §§ 216–220, 223, 248.

upon a promise to hold all or a part for some third person whom the testator desires to benefit, a trust arises which equity will enforce. The ground of such enforcement is not so much the promise as the transfer of property upon the faith of that inducement and with that benefit in view. On the ground that fraud has been committed on the beneficiary, by not carrying out the terms of the transfer as mutually intended and understood, equity interferes to declare and protect the trust; and this with equal zeal, it would appear, whether the gift related to real estate or personalty, and indeed whether the instrument of gift was testamentary or only *inter vivos*. This trust if denied may be proved by parol evidence; for as the written instrument is not thereby disputed, but is shown to have involved a transfer upon some external inducement, there is, it is ruled, no transgression of the Statute of Frauds by offering this proof.¹ So, too, on the other hand, parol evidence *dehors* the will may be adduced to repel any such resulting trust; no such trust, of course, being expressed in the will or instrument of gift, but its effect being to sustain the legal title of donee, devisee, or legatee against a naked equity which is raised by legal implication.²

§ 587. **Effect of Language in Will not to be varied.**—The plain effect of the language as used in the will is not to be varied by external proof of what effect was really intended. Parol evidence may indeed be resorted to for the purpose of making something intelligible in the will which cannot without its aid be understood or resolving a doubtful interpretation; but if the language of the will in point of legal construction requires one interpretation, and can be under-

¹ 1 Jarm. Wills, 415, and Bigelow's note; Russell v. Jackson, 10 Hare, 206; Jones v. Badley, L. R. 3 Ch. 362; 9 Ves. 519; Glass v. Hulbert, 102 Mass. 24; Hooker v. Axford, 33 Mich. 453; L. R. 4 H. L. 82. Cf. Wolford v. Her-
 ington, 74 Penn. St. 311. An English instance cited by Mr. Jarman (1 Jarm. 416) is where the father devises to the youngest son, who promises as an inducement to this devise to pay £10,000 to the eldest son.

² 1 Jarm. Wills, 416, and Bigelow's note; 2 Story Eq. Jur. § 1202; Cas. t. Talb. 79; 9 Ves. 519.

stood in that sense, evidence of intention cannot be adduced to give it another and a different interpretation.¹

§ 588. **General Summary; Failure of Gift Notwithstanding Extrinsic Evidence.**—We have assumed throughout this discussion, that the extrinsic evidence admitted, in the foregoing cases, of whatever kind, whether directly or indirectly bearing upon the testator's actual intent, has been received, if at all, simply as ancillary and subordinate to the purpose disclosed in the written will, in order to aid a doubtful interpretation, and not so as to materially qualify or contradict the instrument or interpolate a testamentary gift which its own tenor did not justify. And were the question an open one in the courts and not already closed to argument, we should incline to contend that in the foregoing distinction is the real root of the matter, rather than in attempting to define positively between the admission or non-admission of direct proof of intention as against indirect proof of extrinsic facts and circumstances; for whether direct or indirect in bearing, all such proof is explanatory merely, under the limitations of our distinction, and all tends in the same direction, namely, to bring extrinsic evidence to bear upon the will, as to what the testator intended, when the will cannot shine by its own light unaided. Indeed, in some of the United States precedents are not conclusive against such a view. But the English rule, at all events, for the present or permanently, draws the line at uncertainty as between two or more subjects or objects and beyond this allows no direct extraneous proof of what was intended,² while American courts still waver about extending the lines to other instances of an uncertain gift.³ All tribunals agree, however, in aiding the will by extrinsic proof of facts and circumstances, and thereby resolving, if possible, whatever must otherwise remain ambiguous or insensible as the written

¹ Wigram Wills, pl. 125; *King v. probate to show that a gift by deed poll*
Badeley, 3 My. & K. 417; *Clementson* duly executed was intended as a will.
v. Gandy, 1 Keen, 309; *Wilkins v. Slinn's Goods*, 15 P. D. 156.
Allen, 18 How. 385; *supra*, § 578.

² *Supra*, § 575.

Extrinsic evidence is admissible in the

³ *Ib.*

instrument stands. And one can well appreciate the good policy, if not the logic, of holding in check that bold, glaring sort of testimony which consists in rough drafts, instructions for a will, hearsay declarations of what the testator intended, the scrivener's confessions, and the like, whose sure tendency is to prove too much, to set an oral will by the side of a written one; and of illuminating the will and the testator's meaning rather by that softer radiance which collateral facts and circumstances may shed.

Doubt and uncertainty may grow out of the thing described as given, or the person or object that shall take, or the language which imports the gift. Whatever the element or elements of uncertainty or senselessness, it is a rule that, where the words of the will itself, aided by extrinsic evidence of the material facts and circumstances, and by such direct proof of intent *dehors* the instrument as courts pronounce admissible, are found insufficient to determine the testator's meaning, the gift, the testamentary provision, will be void for uncertainty.¹

§ 589. **General Summary; Extrinsic Evidence always Admissible to aid in Right Interpretation.** — Conversely, we are to conclude that a court may inquire into every material fact and circumstance *dehors* the will for the purpose of determining the object of a testator's bounty, or the subject of disposition, or the quantity of interest intended to be given by the will in controversy.² And the same holds true of every other disputed point respecting which it can be shown that in any way a knowledge of extrinsic facts will throw more light upon the testator's meaning.³ In short, extrinsic evidence of attending facts and circumstances as to one's family relations, his property, his affairs, and the like, — indeed, of whatever was likely to have influenced the disposition as it appears, — is always admissible for placing the court at the testator's point

¹ Wigram Wills, pl. 105-129, and pl. 58; Shore v. Wilson, 9 Cl. & F. 556; cases cited; 1 Jarm. Wills, 382; 15 Sim. 6 H. L. Cas. 106; Innes v. Sayer, 3 M. 626; 36 Iowa, 674; 55 Ill. 514; Tray- & G. 606.
lor's Estate, *Re*, 81 Cal. 9; next c.

² *Supra*, §§ 582, 583; Wigram Wills,

³ *Supra*, §§ 579, 580; Wigram Wills, pl. 58.

of view when he made the will, and thereby aiding a right interpretation of the instrument.

As a bound, however, to all such extraneous investigation by a court of construction, we may add that whenever the will discloses a clear purpose upon its face, neither the situation of the testator, nor that of his family or property, nor any other outside facts or circumstances can properly be considered in giving effect to the will.¹ And certainly where doubt may be fairly solved by careful recourse to the context, and by bringing all parts of the will together, it is better not to travel outside the instrument at all.

§ 590. **Sir James Wigram's Propositions stated.**—The seven propositions of Sir James Wigram are so generally used by the courts as canons of construction, and have moulded English precedents so greatly, that, without further criticism of their merits, we subjoin them at length for the convenience of the reader.²

¹ *Brearley v. Brearley*, 1 Stockt. (N. J.) 21; *supra*, §§ 468, 568.

² Seven propositions are applicable to the construction of wills. Wigram on Wills, pl. 12-19. — (I.) A testator is always presumed to use the words in which he expresses himself, according to their strict and primary acceptation, unless, from the context of the will, it appears that he has used them in a different sense, in which case the sense in which he thus appears to have used them will be the sense in which they are to be construed.

(II.) Where there is nothing in the context of a will from which it is apparent that a testator has used the words in which he has expressed himself in any other than their strict and primary sense, and where his words so interpreted are *sensible with reference to extrinsic circumstances*, it is an inflexible rule of construction, that the words of the will shall be interpreted in their strict and primary sense, and in no other, although they may be capable of

some popular or secondary interpretation, and although the most conclusive evidence of intention to use them in such popular or secondary sense be tendered.

(III.) Where there is nothing in the context of a will from which it is apparent that a testator has used the words in which he has expressed himself in any other than their strict and primary sense, but his words, so interpreted, are *insensible with reference to extrinsic circumstances*, a court of law may look into the extrinsic circumstances of the case, to see whether the meaning of the words be sensible in any popular or secondary sense, of which, *with reference to these circumstances*, they are capable.

(IV.) Where the characters in which a will is written are difficult to be deciphered, or the language of the will is not understood by the court, the evidence of persons skilled in deciphering writing, or who understand the language in which the will is written, is admissi-

ble to *declare* what the characters are, or to inform the court of the proper meaning of the words.

(V.) For the purpose of determining the object of a testator's bounty, or the subject of disposition, or the quantity of interest intended to be given by his will, a court may inquire into every *material* fact relating to the person who claims to be interested under the will, and to the property which is claimed as the subject of disposition, and to the circumstances of the testator and of his family and affairs, for the purpose of enabling the court to identify the person or thing intended by the testator, or to determine the quantity of interest he has given by his will.

The same (it is conceived) is true of every other disputed point, respecting which it can be shown that a knowledge of extrinsic facts can, in any way, be made ancillary to the right interpretation of a testator's words.

(VI.) Where the words of a will, aided by evidence of the material facts

of the case, are insufficient to determine the testator's meaning, no evidence will be admissible to prove what the testator intended, and the will (*except in certain special cases, see VII.*) will be void for uncertainty.

(VII.) Notwithstanding the rule of law which makes a will void for uncertainty, where the words, aided by evidence of the material facts of the case, are insufficient to determine the testator's meaning, courts of law, in certain special cases, admit extrinsic evidence *of intention* to make certain the *person* or *thing* intended, where the description in the will is insufficient for the purpose.

These cases may be thus defined: where the object of a testator's bounty, or the subject of disposition (*i.e.*, the *person* or *thing* intended), is described in terms which are applicable indifferently to more than one *person* or *thing*, evidence is admissible to prove which of the persons or things so described was intended by the testator.

CHAPTER IV.

MISCELLANEOUS PROVISIONS CONSIDERED.

§ 591. **Gifts sufficiently or insufficiently Certain.**—In this final chapter we shall bring together some miscellaneous matters suggested under the head of testamentary construction with which the preceding chapters have not fully dealt. And, first, to speak in general of gifts under a will which are sufficiently or insufficiently certain. How reluctant are our courts to pronounce a testamentary provision void for uncertainty wherever extrinsic proof may illumine the purpose which the written charter of his last wishes embodies and reduce the doubt to reasonable certainty, we have already observed;¹ how sedulously, too, the wishes of careless and unskilful testators who have drawn their own wills and bungled into awkward and erroneous expressions are regarded; with what tender indulgence the instrument of *post mortem* disposition will be carried into effect by construction, provided it fulfils all the formal conditions which are indispensable to a probate. But after all the indulgence, all the favorable regard possible, after all the comparison of words and phrases, after the long search by the light of extrinsic testimony to discover in the gift a certain and sensible meaning, the court may still be left in impervious darkness, and the will fail of effect in consequence. For conjecture, as Mr. Jarman fitly observes, is not permitted to supply what the testator has failed to indicate; and if, after every endeavor, the judicial expositor “finds himself unable, in regard to any material fact, to penetrate through the obscurity in which the testator has involved his intention, the failure of the intended disposition is the inevitable consequence.”² Nevertheless, in modern times the instances of failure for

¹ See *supra*, §§ 572–590.² 1 Jarman. Wills, 356.

uncertainty are more rare than formerly; partly because rules of construction are now better settled, and partly, no doubt, from the development of personal wealth in our communities, and the decay of that ancient subservience to the heir-at-law, for whose sake the attempted devise of lands was so often pushed aside on one pretext or another.¹

§ 592. **Uncertainty in Subject or Object.**—As we have already intimated,² a gift by will to be certain requires a definite subject and object, and cannot stand if either be wanting; though to identify the thing given, or the person to take, extrinsic evidence is generously admitted.

As to the subject, a gift of “all” was in an early case pronounced too indefinite;³ but whatever imports a residuary gift may be sustained in modern times, though expressed in terms scarcely more specific.⁴ The gift of “some,” or of an indefinite fund, is uncertain;⁵ yet the motive of the gift, if apparent, may reduce this to certainty by supplying the means of estimating its amount.⁶ It matters much whether the context indicates, in such cases, that important words are left out or that the gift stands instead, as finally and completely, though informally, expressed.⁷ Uncertainty, however, which arises from two repugnant provisions may of course be reconciled by the usual rules.⁸ The gift of part of a larger quantity is not uncertain where the devisee or legatee has a right to select;⁹ for here the beneficiary may take the larger part, if not the whole, and it is only the gift over of what remains that proves precarious; and even this latter gift will be sustained, if possible.¹⁰ The gift of what remains undisposed of may indeed be often repugnant to the first gift, or too nearly so to vest a certain right; nevertheless, a gift is good of

¹ The old cases of uncertain gift are of little value as precedents at this day. 1 Jarm. 357.

² *Supra*, §§ 572–588.

³ 1 Lev. 130, Sid. 191.

⁴ 1 Jarm. Wills, 357, 358; Bassett's Estate, L. R. 14 Eq. 54.

⁵ 2 P. W. 387; *Jubber v. Jubber*, 9 Sim. 503; *Gray Re*, 36 Ch. D. 205.

⁶ 3 J. & Lat. 702; 10 Sim. 193; 1 Jarm. Wills, 358.

⁷ See *Mohun v. Mohun*, cited 1 Jarm. 357.

⁸ *Supra*, § 478; 81 Ind. 224; 103 Ill. 607.

⁹ 2 P. W. 387; L. R. 1 Eq. 378, *Kennedy v. Kennedy*, 10 Hare, 438.

¹⁰ 1 Jarm. Wills, 363.

what shall remain at the decease of the first taker, if the latter has only a life estate given him, or if such a gift is preceded by a power of disposition so restrained in its exercise that the gift of what is left refers evidently to what shall remain unappropriated and unappointed under the power.¹ A blank in a will accompanied by an uncertain description, is likely to prove fatal to the gift.²

Uncertainty as to the object of gift may often be cleared by explanatory proof of extrinsic facts and circumstances, and even of intention, under the rules already stated;³ but the uncertainty which avoids here as well as elsewhere, is that which either leaves the obscurity unaided in fine by proof from without, or confirms an inference that the testator had not really made up his own mind. There may be an equivocal or vague description capable, as we have seen, of personal application with the aid of parol proof.⁴ But where the will itself specifies a class all of whom are not to take, yet leaving it in doubt which was to be selected, as in a devise to "one of the sons" of A B (who has several sons), the gift is held void for uncertainty; and probably because the will does not here intimate that the testator had a definite object of bounty selected in his own mind, but rather the contrary.⁵ Where, however, the gift is to all of a class except one person who is not named or cannot be ascertained, the inference being consistent that the testator understood his own exception, the will is upheld by taking effect in favor of the whole class.⁶ Another ground for pronouncing the gift void in such cases might be the testator's apparent misconception; as where he gives a legacy to A's oldest son,

¹ See *Surman v. Surman*, 5 Mad. 123; 1 De G. & S. 288; *Bibbens v. Potter*, 10 Ch. D. 733; 1 Jarm. Wills, 363-365, where the authorities are collated.

² For instance, where executors were required "to purchase at a price not exceeding \$, a tract of land at or near the residence" of certain persons, the clause was hopelessly uncertain. Cf. § 584.

³ *Supra*, §§ 572-588.

⁴ *Ib.*

⁵ See 1 Jarm. Wills, 370, where various examples are stated. As if one should make a gift to twenty of the poorest of his relatives. 1 Roll. Abr. 609. So where one names "one of my sisters to be executrix." 2 P. D. 72.

⁶ 1 Jarm. Wills, 370; 3 K. & J. 206; 9 Hare, 37; *Gill v. Bagshaw*, L. R. 2 Eq. 746.

and A never has a son, but daughters ; though here it might instead be inferred that the gift was meant supposing A should ever have a son. The confusion of singular and plural in describing the object, the use of contradictory or repugnant words, gifts to several alternately or successively without specifying the order, these are among the various instances in which a devise or bequest has been adjudged void for uncertainty of object ; and the fault is in the will, which becomes entangled in its own words so that a clear intention cannot be extricated from the expressions.¹

§ 592 a. **The Same Subject.**—A testator, it is held in England, may give the residue of his estate to such charities as the executors named in his will may select ; and such right of selection subject to chancery supervision is personal to the executors.² Conformably moreover to what is known as the *cy pres*³ doctrine, English courts of chancery have sustained a will as much as possible, by a sort of straining process and with no great regard to legal consistency, where devises and bequests are given for charity ; treating each particular case upon its own merits, expounding the gift so as to avoid the testator's possible attempt to create a perpetuity ; and, out of deference to the substantial intention of the will to benefit one's fellow-men by a charity, provided such intention appear, to invent some practicable means of carrying the gift into effect, even though the testator's own mode must fail for technical reasons.⁴ Such jurisdiction partakes somewhat of royal prerogative ; and the doctrine of *cy pres* does not universally obtain in this country to the detriment of heirs and next of kin ; some important States of our middle section and elsewhere expressly repudiating it, while all the New England States, excepting Connecticut, approve it.⁵

Independently of this *cy pres* doctrine, a trust under a will

¹ 1 Jarm. 370-374. See Whitesides v. Whitesides, 28 S. C. 325.

² Crawford v. Forshaw, 43 Ch. D. 643. Consequently an executor named in the will, who has renounced probate, has a right to take part with the executors

who qualify in selecting the charities. Ib.

³ L. Fr. As near as.

⁴ 4 Ves. 14; 7 Ib. 69, 82.

⁵ Bouv. Dict. "Cy Pres"; Bisph. Equity, § 130.

is liable to be declared void, though evidently for commendable and benevolent objects, for want of a certain designated beneficiary, for uncertainty and indefiniteness in its objects, and for excess of jurisdiction vested in the executors and trustees.¹ A charitable use may be applied to almost any object, tending to promote the well-being of mankind; and a valid devise or bequest may be limited to a corporation to be created under legislative sanction after the testator's own death, provided it be called into being within the time limited for the vesting of future estates.² Beneficiaries, in general, may not be definitely known or ascertained at the time of the testator's death, and it is sufficient that they are so described in the will as to be ascertained in the future when the right accrues to receive the gift; no rule of perpetuities being transgressed. But, without the aid of the English *cy pres* doctrine, a grant which is dependent upon the selection by one's executors and trustees of the charitable, educational, and scientific purposes to which the fund shall be applied is ineffectual and void because of indefiniteness and uncertainty.³

§ 593. **The Same Subject.**—The precedents, and English precedents especially, treat charitable bequests, therefore, with every possible indulgence, sustaining gifts in this respect which, were individuals the objects, must inevitably have failed.⁴ Thus, it is said that where there are two

¹ See *Tilden v. Green* (N. Y. 1891), 44 Alb. L. J. 368, where, by a bare majority, the New York Court of Appeals declared a trust void for uncertainty, whose primary object was to establish and maintain in New York City a free library on a noble and munificent basis.

² *Perry Trusts, Re*, § 637, 736; *Inglis v. Sailors' Snug Harbor*, 3 Pet. 99; 43 N. Y. 254. But a devise to a charitable corporation to be incorporated by an act from the legislature within a specified number of years after the testator's death, may transgress the rule of perpetuities. *Cruikshank v. Chase*, 113 N. Y. 337.

³ *Tilden v. Green* (N. Y. 1891), *supra*. In this instance, which is likely to be celebrated in legal history, the Court of Appeals most singularly caused the splendid public endowment of the testator to fail, within the State jurisdiction, so that distant relatives might inherit the estate, by refusing to disjoin in construction, the procurement of a lawful beneficiary by legislative act, from the more remote and objectionable discretion which the will vested in the executors and trustees, chiefly, as it would appear, by way of alternative, should the beneficiary fail.

⁴ 1 Jarm. Wills, 376.

charities bearing the same name, and it cannot be ascertained which of them the testator intended, the legacy will be divided between them;¹ a doubtful example, for in so extreme a case, and supposing extrinsic proof left one's intention balanced, the analogy ought to hold good in the case of individuals.² If some individual or charitable object answer the description embodied in the will, no proof that the testator meant another is admissible; and where again the will purports to distribute among various objects, that intent in either case must be upheld;³ and once more, if proof in aid of a doubtful description points to one object rather than another, the more probable object takes the whole.⁴ But this distinction at least is observable: that in the gift to an individual or to some business corporation, a private or personal bounty was in the testator's view, while in gifts to religion, education, or other charities, the benefit bestowed is a public one; and to carry that public benefit into effect, if the scheme be feasible and can be gathered from the will, is, after all, the prime concern, the identity of the trustee or conduit of the testator's benevolence being but secondary in consequence.⁵

All particulars of description, whether relating to subject or object or both, need not, as we have seen, be accurate, provided enough remain to identify after rejecting the false description and calling in such explanatory proof to help interpret the instrument as the rules of evidence permit.⁶ And the rule is a general one, that no misdescription of the thing given or the taker shall defeat the gift, if upon the whole there is no reasonable doubt, consistently with the will's own expression, who or what was intended.⁷ And while a wholly false or uncertain description by the will may vitiate

¹ Amb. 524; 2 Beav. 81; Alchin's Trusts, L. R. 14 Eq. 230.

² Hare v. Cartridge, 13 Sim. 167. *Contra*, 2 Jarm. 376.

³ See 25 Beav. 109; 7 Met. 188.

⁴ 1 H. L. Cas. 778.

⁵ The limits of this work forbid an extended examination of the law of

charitable gifts, with its great multitude of precedents. The subject is briefly touched upon in Schoul. Exrs. and Adms. §§ 464, 465, and discussed at full length in Perry Trusts, §§ 687 *et seq.*, and 1 Jarm. Wills, 209-250.

⁶ *Supra*, § 576.

⁷ *Supra*, § 588.

the gift, and still more a description which has its clear and appropriate application elsewhere is not to be corrected by parol as a misdescription at all, a description failing in certainty can nevertheless be thrown out in many instances without injury to a clear and unambiguous gift which some prior description in the same instrument sustains.¹ No gift can, in short, be pronounced void for uncertainty until after a resort to oral evidence it still remains a matter of conjecture what the testator intended.²

§ 594. **The Same Subject.**—Where the construction of a gift is doubtful after all extrinsic assistance is afforded, the leaning of the court should be to that course of disposition for which public policy pronounces in the statutes of descent and distribution; and this maxim may serve for particular words and phrases of uncertain tenor.³ So, if equivocal description be not corrected by the context and parol evidence, but the name and description equally balance, either the gift must be divided; or, as some cases hold where no charitable purpose is disclosed, the gift fails altogether.⁴ And where, upon the whole, the provisions of a will in each and all of its items are so obscure, that with all the light of extrinsic evidence no definite idea can be formed of what the testator intended in any of the dispositions he has tried to make, the will must fail of effect for uncertainty.⁵

To avoid a will or any of its provisions at the present day for uncertainty, it is not enough that the disposition appears too obscure and irrational for the testator to have been likely to intend it; but, more than this, the gift must be without clear meaning at all.⁶ And where both name and description correctly describe some person or thing, the improbability of such a gift on general principle shall not defeat it.⁷

¹ *Supra*, § 516; 78 N. C. 396.

² *Congregational Society v. Hatch*, 48 N. H. 393; 4 Paige, 271. See further, 57 Conn. 147.

³ *France's Estate*, 75 Penn. St. 220; 80 Ib. 340.

⁴ *Supra*, § 593; *Drake v. Drake*, 8

H. L. Cas. 172; 1 Jarm. 382.

⁵ *Cope v. Cope*, 45 Ohio St. 464.

⁶ *Mason v. Robinson*, 2 Sim. & S.

295; *Wootton v. Redd*, 12 Gratt. 196.

⁷ 1 Jarm. Wills, 383; *Mostyn v. Mostyn*, 5 H. L. Cas. 155.

§ 595. **Uncertainty in creating a Trust; Precatory Trusts.**—Any particular will may disclose an intention to create a trust, without clearly defining the objects or purposes of that trust. Expressions of desire accompanying a devise or bequest are *prima facie* obligatory, moreover, and create a trust unless the actual intention appears different.¹ Where, for example, one gives to A B \$5000, hoping, wishing, recommending, expecting, or, perhaps, entreating, him to give the same or some part of it to C D, or use it for C D's benefit,—for here C D is considered an object of the testator's bounty,—A B is, *pro tanto* at least, a trustee for him by inference.² Out of this rule grows the doctrine of precatory trusts, as they are called; and the test question in such trusts is whether by using these words milder than a command, the testator meant to control A B or to submit a proposed benefit to his discretion or selection instead.³ For in this latter case the usual presumption is overcome, and the legatee may carry out the request or not as he chooses, and no trust is created.⁴ No general rule, aside from the testa-

¹ 1 Jarm. Wills, 385, and Bigelow's note; 2 Ves. 333; Knight v. Boughton, 11 Cl. & F. 513; Knight v. Knight, 3 Beav. 148; 3 Mac. & G. 546; Hawkins Wills, 159; 2 Story Eq. Jur. § 1068; 15 Ohio St. 103; Warner v. Bates, 98 Mass. 274; 35 Me. 445; Harrison v. Harrison, 2 Gratt. 1; 13 Penn. St. 253; 1 N. H. 217; 35 Vt. 173.

² Knight v. Knight, *supra*. And see *supra*, § 263.

Among expressions which in the English cases have been treated as *prima facie* creating a precatory trust are these: "recommend," "request," "entreat," "advise," "confidence," "under the conviction that," "in full confidence that," "in full faith that," "not doubting," and even "hoping." Hawkins Wills, 159-162, and cases cited; 1 Jarm. Wills, 387; 93 Mo. 367; Colton v. Colton, 127 U. S. 300.

³ Pennock's Estate, 20 Penn. St. 268; Stead v. Mellor, 5 Ch. D. 225. If such words are addressed to an executor, they

are more clearly imperative. 66 Penn. St. 402.

In American States the English doctrine of precatory trusts is not always adopted with full force; and still less are our courts disposed to adhere to any artificial rule on this subject. See Hawkins Wills, 159, Sword's note. See also Gibbins v. Shepard, 125 Mass. 141; Van Gorder v. Smith, 99 Ind. 404; 100 Ind. 148; Van Amee v. Jackson, 35 Vt. 173; 20 Penn. St. 268; Burt v. Herron, 66 Penn. St. 400; Brasher v. Marsh, 15 Ohio St. 103; Howard v. Carusi, 109 U. S. 725; 37 N. J. Eq. 21; 86 Cal. 265; 29 S. C. 54; where the precatory words were treated as amounting to mere recommendation. On the other hand, Bigelow, C. J., in Warner v. Bates, 98 Mass. 274, pronounces the general principle of construction a sound one, and only open to criticism as courts have sometimes applied it in particular wills.

⁴ See 1 Sim. 542; Webb v. Wools,

tor's obvious intention, can be formulated for determining whether a devise or bequest carries with it the whole beneficial interest, or whether it should be construed as creating a trust; but if a trust capable of enforcement be sufficiently expressed, it does not disparage, much less defeat it, to call it "precatory."¹

Mere expressions of kindness and good will towards these third parties, or an appeal to the donee's liberality on their behalf, is not enough to create a precatory trust for their benefit and make the dubious words alluded to operate to qualify the legatee's interest.² Nor do expressions which *per se* might amount to a trust have that effect, when so accompanied by other words that the will declares or implies on the whole a contrary intent. Doubtful cases may be explained by the context; a clear devise or legacy is not to be cut down by repugnant expressions in the will;³ and where the words of the gift point plainly to a full, absolute, and unfettered enjoyment by the donee himself, mere precatory expressions annexed to the gift can hardly be pronounced imperative.⁴ And where the testator obviously intends a gift

² Sim. N. S. 267. In like manner, the words "in trust" were not meant to create a technical trust. 60 Penn. St. 344.

¹ *Per curiam*, 127 U. S. 300, 312.

² Bond *Re*, 4 Ch. D. 238; 1 Jarm. 388; 11 Cl. & F. 513; Sale *v.* Thornsberry, Ky.

³ See § 478.

⁴ 1 Jarm. Wills, 388; Knight *v.* Boughton, 11 Cl. & F. 513; 14 Sim. 379; Meredith *v.* Heneage, 10 Price, 306. Some cases seem reluctant to uphold a widow's absolute discretion and control of the property as against the testator's own children. See 16 Jur. 492, cited 1 Jarm. 390. But other precedents treat her with the usual favor where doubtful precatory words accompany an absolute gift in her favor. Hutchinson *Re*, 8 Ch. D. 540. So far as the children concerned are all her own, and none of them step-child-

dren, we may well accede to the latter view.

Where a devise or bequest is unlimited and accompanied by an absolute power of disposition, a mere desire or request that all which remains undisposed of at the legatee's death shall go to certain persons cannot control the gift. 113 Ind. 18; Bills *v.* Bills, 80 Iowa, 269. See also § 600, as to repugnant conditions annexed to a gift; Whitcomb's Estate, 86 Cal. 265.

Where all the testator's property was devised and bequeathed to his wife, coupled with a "wish" that she should pay collateral kindred annually so much "if she find it always convenient," this is a trust dependent upon the widow's "convenience" and not upon her volition. Phillips *v.* Phillips, 112 N. Y. 197. See Enders *v.* Tasco, Ky. 1889.

subject to the beneficiary's discretion on certain points, that discretion must be respected.¹

The indefinite nature and quantum of the subject, and the indefinite nature of the objects, are always used by the court as evidence that the mind of the testator was not to create a trust.² There is a wide difference between a power under the will which the donee is free to exercise, and a trust, which equity will enforce regardless of his wishes. And while American courts have declined to follow the English precedents where there is danger that literal construction will force a trust out of loose words where none was intended, the English chancery judges seem of late disposed in many instances to retrace their steps, as though conscious that the doctrine of precatory trusts had been pressed too far by some of their predecessors, and loose recommendations invested with a peremptory meaning which robbed the gift of its just efficacy.³ But a trust may still be created out of precatory expressions, and enforced where the supposed objects of the testator's bounty are certain and definite, the property clearly pointed out, and the natural relations of the testator to the beneficiaries such as to raise a strong motive for making a trust instead of confiding implicitly in the donee's discretion; and where, most of all, the strength of the language used by the testator besides warrants the inference that a decided, though soft, imperative was intended.⁴

¹ Lawrence v. Cooke, 104 N. Y. 632; 125 N. Y. 427.

² Lord Eldon in Morice v. Durham, 10 Ves. 536.

³ 1 Jarm. Wills, 391; James, L. J., in Lambe v. Eames, L. R. 6 Ch. 599. Some of the earlier chancery decisions of Sir John Leach and others put a careful construction upon precatory expressions. *Ib.*; 5 Mad. 434; 1 Russ. 509; 2 My. & K. 197.

⁴ Cases *supra*; 2 Story Eq. Jur. §§ 1069, 1070; 1 Jarm. Wills, 391, Bigelow's note; Bigelow, C. J., in Warner v. Bates, 98 Mass. 274, and cases cited; Colton v. Colton, 127 U. S. 300.

(1) *As to uncertainty of amount.*

A gift to A, with precatory words as to disposing "what shall be left" at his death, or "the bulk" of the property, or what "he may save" out of income, serve as examples. Hawkins Wills, 164, citing 1 Bro. C. C. 179; 2 My. & K. 197; 10 Hare, 234. And see 1 Jarm. 396. But whatever difficulties might have been supposed to stand in the way of enforcing a trust, the extent of which was hopelessly unascertained, a court of equity can measure the extent of interest which adult or infant shall take under a trust for his support, maintenance, advancement, provision, etc.,

And we apprehend, furthermore, that precatory words may in some cases establish a trust so far that the donee must fairly exercise an honest discretion pursuant to the terms of the will, or else a court of equity is likely to control him.¹ The words "wish," "desire," and the like, expressed where the testator bestows without reference to acts of one or another beneficiary may be presumed to have an imperative sense.²

§ 596. **Uncertainty in creating a Trust; Gift for Specified Purpose.**—The question whether a trust is sufficiently created may also arise where the testamentary gift is made for some specified purpose and without precatory words. Where the declared purpose of the gift is for the benefit of the donee

out of a fund larger, confessedly, than such adult or infant can claim, and some interest in which is given to another person. *Wigram, V. C.*, in *Thorp v. Owen*, 2 Hare, 610; *Hawkins Wills*, 165; 98 Mass. 274; 2 My. & K. 138. There may be a gift to A, a widow, for the benefit or support of herself and her children, so as to create a trust. 35 Me. 445; *Loring v. Loring*, 100 Mass. 340; *Woods v. Woods*, 1 My. & Cr. 401.

(2) *As to uncertainty of objects.* A gift to A, "hoping he will continue them in the family," was held too uncertain to create a trust. *Harland v. Trigg*, 1 Bro. C. C. 142. But *cf. Coop.* 111. So, too, with a gift coupled with a request to "take care of B and his family," etc. 10 Gill. & J. 159; 21 Conn. 259. But vagueness of object, though unquestionably a ground for holding that no trust was intended, may yet be countervailed by other considerations to the contrary, if only it clearly appears that a trust was intended. As when the gift is to A, "well knowing that she will dispose of the same in accordance with my views and wishes." 3 Mac. & G. 546. For, though circumstances may make it impossible to ascertain what are these views and wishes, the

inference is that the testator had a definite gift for the benefit of others in his own mind.

On the whole the question seems to be whether as to the *quantum* given or the objects of the supposed trust, the testator intended that something definite or capable of ascertainment should go positively as indicated, or that he purposely left the amount or object indefinite with the idea of making suggestions to the donee for his own guidance and convenience rather than controlling him, and meaning that the donee shall himself select amount or object at his own discretion. Thus, where the testator requests the donees to "distribute the fund as they think will be most agreeable to his wishes," no imperative trust is created. See *Stead v. Mellor*, 5 Ch. D. 225. Nor is a wife's direction in a will binding that her husband shall make certain gifts and mementos to such persons as she had verbally named and requested of him. 125 N. Y. 427.

¹ See next section, where this principle of construction is applied; 1 *Jarm. Wills*, 399; *Raikes v. Ward*, 1 Hare, 445; 1 *De G. & J.* 352.

² See § 263.

and no one else, it is usually held that the gift is absolute notwithstanding, and that the donee may claim it without applying or binding himself to apply the money according to such purpose; as if, for example, the legacy is specified to be given him to purchase a mill, a life-annuity, a dwelling-house, to maintain and educate him, set him up in business, and the like.¹ It follows that though the legatee thus named die before the stated purpose of the gift can be executed, having survived the testator, his legal representative shall take the gift; for the gift has vested in point of interest, and no condition precedent was annexed to it.² American cases hold, moreover, that a gift to enable a legatee to confer a bounty on others is not a trust, but a beneficial legacy to him;³ and this accords with the doctrine of our preceding section.

The principle which underlies these cases is that equity will not compel that to be done which the legatee might undo the next moment by selling the thing to be purchased,⁴ or rather that the gift vests absolutely in the donee, where a purpose is stated but not a positive condition of receiving. Yet here, as usual, the true scope of the gift and the testator's intention must be studied in the context. If trustees are to hold the property for this donee and appropriate the income for the purpose stated, with a gift over in case he should alienate or become bankrupt, his right to receive the fund is intercepted;⁵ for the absolute enjoyment of the fund or *jus disponendi* is here withheld from the beneficiary; and where again the amount to be applied for his benefit is left to the discretion of trustees, his gift becomes correspondingly limited.⁶

¹ 1 Jarm. Wills, 397, and cases cited; *Apreece v. Apreece*, 1 V. & B. 364; *Knox v. Hotham*, 15 Sim. 82; 16 Ib. 45; 9 Ib. 472; 28 Beav. 620.

² *Attwood v. Alford*, L. R. 2 Eq. 479; 2 P. Wms. 308; *Barnes v. Rowley*, 3 Ves. 305. This holds true *semble*, although the gift is not immediate, but subject to some prior life interest. *Day v. Day*, 17 Jur. 586, cited in 1 Jarm. 397. *Contra*, L. R. 8 Eq. 262.

³ 1 Jarm. 397, Bigelow's note, citing 11 Rich. Eq. 238; 11 S. C. 375.

⁴ 1 Jarm. 398. A simple direction in the will that the property be converted does not exclude the principle of the text. *Ib.*

⁵ *Hatton v. May*, 3 Ch. D. 148.

⁶ See L. R. 7 Ch. 727; 3 K. & J. 497; 1 Jarm. 397, 398.

A stronger motive for inferring a trust arises when the specified purpose or motive of the gift is the benefit of another person or persons and not of the primary donee alone. Here the principles already announced in considering precatory trusts must be applied, and the particular will subjected to its own natural interpretation. No positive rule can be laid down for all cases, but one of these three constructions may be gathered from the particular context and circumstances: (1) that an imperative trust was intended; (2) or that the primary donee may freely exercise his own discretion as to the quantum of benefit to the other person or persons, provided his discretion be honestly exercised; (3) or that the expression of motive or purpose, being wholly nugatory, the primary donee's gift remains unabridged.¹

§ 597. **The Same Subject: General Conclusion.**— Upon the whole, although courts appear less disposed than formerly to conjure up a trust from doubtful and uncertain expressions of intent, and to recognize at length the testator's own purpose not to encumber his gift with obligations, but rather to express his own good will towards others while confiding their interests to his donee's sense of honor and fairness; and although an expressed purpose should not be presumed to annex to the gift any condition; yet the introduction of all such doubtful expressions into a will should be avoided, if possible, for it almost infallibly sets third parties gaping for something more than any legatee's free discretion is likely to bestow upon them, and more too, as a matter of right perhaps, than the testator himself had ever dreamed they should

¹ In 1 Jarm. Wills, 399-404, the English precedents which arise under these three rules of construction are stated at length. On the whole, Mr. Jarman considers that the preponderance leans in favor of giving the primary donee a discretion which he must honestly exercise, or in default subject himself to the control of the court; but with a tendency to narrow rather than extend the effect for-

merly ascribed to words expressive of the purpose or motive of the gift. To these cases, which turn upon minute differences of expression and circumstance, no extended reference is necessary. Among them are *Jubber v. Jubber*, 9 Sim. 503; *Hamley v. Gilbert*, Jac. 354; 10 Sim. 371; 1 Hare, 445; *Lambe v. Eames*, L. R. 6 Ch. 597.

receive ;¹ and out of the ill-feeling and disappointment comes litigation.

No technical words are of course requisite for creating a trust if only the intention to do so be apparent in the instrument. Any donee or recipient of property may be adjudged a trustee thereof because of the obligations under which he takes it. And the effect where the intention to create the trust is sufficiently clear, but not the purpose or object of that trust, is to cast upon the devisees or legatees in trust (if they are pointed out distinctly) the legal interest in the gift, not however for their own benefit nor for the too uncertain objects, but for the person or persons in whom the law vests the property where one has died intestate.²

§ 598. **Testamentary Gifts upon Condition Precedent or Subsequent.** — A testamentary gift may be upon some condition precedent or subsequent ; and to create such condition no particular form of words need be used, for if a corresponding purpose be read in the will, that purpose takes effect. No doubt it is desirable to employ such customary expressions more or less positive as “on condition that,” “provided,”³ “if,” and the like ; nevertheless, a mere devise or bequest to A, “he paying,” or “he to pay \$500 to C,” may amount to a condition if the context justifies that sense.⁴ Any qualification, restriction, or limitation, annexed to a gift, and modifying or destroying essentially its full enjoyment and disposal, may be deemed a condition. But words of mere description or inducement for making the gift do not constitute a condition.⁵ Practical difficulty, however, is often

¹ Caution in the employment of words which might give rise to a question of this sort is enforced by Mr. Jarman. “If a trust is intended to be created, this should be done in clear and explicit terms; and if not, any request or exhortation which the testator may choose to introduce should be accompanied by a declaration that no trust or legal obligation is intended to be imposed.” 1 Jarman. Wills, 405.

² “In other words, the gift takes effect with respect to the legal interest, but fails as to the beneficial ownership.” 1 Jarman. 383.

³ Co. Lit. 236 b; 2 Jarman. Wills, 1, 2.

⁴ The word “proviso” in modern times favors the idea of a fee upon trust rather than a strict devise upon condition. *Stanley v. Colt*, 5 Wall. 119.

⁵ *Denby Re*, 3 De G. F. & J. 350; *Porter Re*, L. R. 2 P. & D. 22; *Skip-*

found in adjudging whether words or expressions annexed to a particular gift bound the donee to fulfil the description or were incidentally used by way of identifying him or expressing the testator's motives ; whether or not a qualification, restriction, or limitation upon the gift was the true intent of the instrument. This question must, wherever it arises, depend upon the fair intendment of the particular will, aided, if need be, by extrinsic and explanatory proof.

Conditions in wills, as in other instruments, may be precedent or subsequent ; in the one case, the estate or interest does not vest until the condition is fulfilled ; in the other, it is liable to be divested if the condition afterwards fails. The distinction is an obvious one in its consequences ;¹ but the obscure and ambiguous language of the will renders it in many cases very perplexing to tell whether the testator meant the one sort of condition or the other, if, indeed, he clearly apprehended the distinction at all. No criterion is afforded by the choice of technical expressions, but the probable intention of the testator must determine the construction in every case of this kind.²

§ 599. **The Same Subject.** — Instances of conditions precedent in a will occur not unfrequently in the reports. As where property is devised or bequeathed to A if he lives to the age of twenty-five ;³ or if he marries B⁴ or into B's family,⁵ or marries with C's approbation (if C be living),⁶ otherwise over ; or upon condition that A shall release all

with *v. Cabell*, 19 Gratt. 758. And see *supra*, §§ 285–290, as to conditional or contingent wills.

¹ See 4 Kent Com. 125, as to these consequences. Precedent conditions must be literally performed ; and even a court of chancery will never vest an estate when by reason of a condition precedent it will not vest in law. It cannot relieve from the consequences of a condition precedent unperformed. But one who has himself prevented performance cannot take advantage of the non-performance. 4 Jones L. 249.

² 4 Kent Com. 124 ; *Finlay v. King*, 3 Pet. 346.

As to a condition annexed to a joint gift, where one of the beneficiaries broke the condition without concurrence of the other, see *Rockwell v. Swift*, 59 Conn. 289 ; *Hayes v. Davis*, 105 N. C. 482.

³ 8 Vin. Ab. 104, pl. 2.

⁴ *Davis v. Angel*, 31 Beav. 223 ; 4 De G. F. & J. 524.

⁵ 15 Ves. 248 ; *Randall v. Payne*, 1 Bro. C. C. 55.

⁶ 5 Vin. Ab. 343, pl. 41 ; 2 Jarm. Wills, 2, 3.

other right or claim out of the testator's estate;¹ or if A be unmarried at a time implied or specified in the will;² or after C ceases to be a widow, providing A shall live on the place and carry it on until that time;³ or with power to sell the property if the income proves insufficient.⁴ A bequest to a college on condition that its name is changed before the testator's decease fails unless strictly complied with, and legislation to change the name comes too late if not procured during the testator's lifetime.⁵

Conditions subsequent are likewise illustrated in the books. As where A is excluded from the benefits of a will which devises in trust for him and his heirs unless his father shall settle upon him (as *e.g.*, by his own devise) a specified estate.⁶ So, too, when an interest is given to A, coupled with a direction that on some prescribed event, such as A's marriage without B's consent, it shall be forfeited, or so that it shall last as long as his conduct is discreet and approved by B and no longer.⁷ So where a house is devised upon condition that the devisee shall keep the house in good repair, otherwise over.⁸ And in various gifts which are made conditional upon the maintenance or education of others specified by the will.⁹

An estate is presumed to vest on the testator's death, rather than at a later date. Hence, if no intention to defer the period of vesting definitely appears, while a definite date for performing the condition after the testator's death appears, or if there appears a vesting as usual, though upon probate, a condition subsequent rather than precedent may be inferred. But the preferable inference is that of a con-

¹ Willes, 153; *Gillett v. Wray*, 1 P. W. 284.

² *Ellis v. Ellis*, 1 Sch. & L. 1.

³ *Marston v. Marston*, 47 Me. 495.

⁴ *Minot v. Prescott*, 14 Mass. 495. See also 2 Jarm. Wills, 4, Bigelow's note; 20 N. J. Eq. 43, 218; *Caw v. Robertson*, 1 Seld. 125; 10 Watts, 179; *Nevens v. Gourley*, 97 Ill. 365.

⁵ *Merrill v. Wisconsin Female College*, 74 Wis. 415.

⁶ *Popham v. Bampffield*, 1 Vern. 79. And see *Cro. Eliz.* 795.

⁷ 2 Jarm. Wills, 6, 7; 2 P. Wms. 626; 2 Salk. 570; *Lloyd v. Branton*, 3 Mer. 108; *Wynne v. Wynne*, 2 M. & Gr. 8.

⁸ *Tilden v. Tilden*, 13 Gray, 103.

⁹ *Smith v. Jewett*, 40 N. H. 530. And see 10 Pick. 306; *Hogeboom v. Hall*, 24 Wend. 146; *Lindsey v. Lindsey*, 45 Ind. 552; 41 Mich. 409; 3 Woods C. C. 443; *Morse v. Hayden*, 82 Me. 227; 79 Wis. 557.

dition precedent where the vesting appears deferred to some definite date after the will comes into operation, especially if by some prompt or decisive act, the condition may be performed or its alternative solved. Some cases reach also a readier conclusion that the condition is precedent and not subsequent, where it affects a pecuniary legacy or something to be raised out of the bulk of the estate and no more, than where its operation must be to suspend the vesting of an entire residue or the main inheritance under the will. The condition subsequent better fits the adaptation of the will to peculiar and unforeseen exigencies which may arise after it has passed out of its maker's control; for a court of equity may, and frequently does, relieve the donee from embarrassing conditions which turn out harsh, impossible, and unconscionable; but to vest an interest in any one clear of its condition precedent, no matter how unjust or incapable of performance that condition may prove, is beyond the scope of its authority.¹ The acceptance of the gift compels one to comply with the condition annexed to it; and the parties injured by his non-compliance are not without redress in law or equity.² But while the devisee or legatee may be forced to comply with his condition, and those clearly entitled to the property upon a breach may even bring their writ of entry or other appropriate suit at law, equity is always indisposed to declare a forfeiture, and refuses its aid to divest a title under the will for breach of condition subsequent, affording relief rather against forfeiture whenever compensation in damages can be made in full of the injury.³ Conditions subsequent

¹ 2 Jarm. Wills, 9; Co. Lit. 206 b; *Boyce v. Boyce*, 16 Sim. 476; *Marston v. Marston*, 47 Me. 495; 4 Kent Com. 124, 125. See, e.g., *Davis v. Angel*, 4 De G. F. & J. 524, where the condition precedent was that the donee should marry B, and it was shown that with the testator's own consent he had already married C. The right to the gift does not accrue as it would appear, where the condition is precedent, even though act of God made the performance impossible. 29 Vt. 273; 13 B.

Mon. 163; *Roundel v. Curren*, 2 Bro. C. C. 67. But a gift to A, on condition that he shall maintain the testator's son during the latter's minority, vests an absolute title in A if the son dies before the testator; because this is deemed a gift on condition subsequent. *Morse v. Hayden*, 82 Me. 227.

² *Tilden v. Tilden*, 13 Gray, 103.

³ *Smith v. Jewett*, 40 N. H. 530; 4 Kent Com. 147; 2 Story Eq. Jur. §§ 1315, 1319.

are construed beneficially in order to save, if possible, the vested estate or interest; and if such condition prove illegal or incapable of performance, whether as against good morals, or as impossible under any circumstances, or as rendered impossible in the particular case and under the existing circumstances, the gift, whether of real or personal property, relieved of the condition, becomes absolute in effect.¹ On the other hand, a condition precedent, impossible either in its creation or under the existing circumstances, or illegal, carries down in its defeat the gift whose vesting depended upon it, though the donee himself be blameless;² and strict construction here avails little if it cannot pronounce that the will in reality imposed no distinct condition precedent at all. In short, the standpoint both of donee and court is far more favorable for doing as substantial justice may require where the condition grows out of acceptance instead of obstructing it.

§ 600. **The Same Subject.**—As to the time required for performing or fulfilling a condition precedent or subsequent, this should be that period which the will prescribes, if the testator clearly expresses or indicates his wishes; otherwise, a just and reasonable time, as the nature of the case and a fair construction of the instrument may import.³ Some authorities contend that where the will specifies no time for performance, the donee shall have his whole lifetime;⁴ but

¹ Shep. Touch. 132, 133; 2 Jarm. Wills, 10-13; Collett v. Collett, 35 Beav. 312; Hervey-Bathurst v. Stanley, 4 Ch. D. 272; Conrad v. Long, 33 Mich. 78; 75 Ill. 315; 4 Kent Com. 130; Parker v. Parker, 123 Mass. 584; Shepard v. Shepard, 57 Conn. 24.

² Shep. Touch. 132, 133; 3 Bro. C. C. 67; 2 Jarm. Wills, 9-13; Boyce v. Boyce, 16 Sim. 476; 97 N. C. 295. The civil law as adopted by courts of equity appears to slightly alleviate this hardship, where personalty is bequeathed, by treating the gift as an absolute one if the condition precedent must have been known by the testator to be impossible from its creation, or his own

act and default has made it such, unless performance of the condition made evidently the sole motive of the bequest. 2 De G. & S. 49; 2 Jarm. Wills, 12, 13. See repugnant conditions, next section; Moore *Re*, 39 Ch. D. 116.

³ 2 Jarm. Wills, 7, 8, and Bigelow's note; 1 Salk. 570; Gulliver v. Ashby, 1 W. Bl. 607; 2 Met. 495; 54 Me. 291; Ward v. Patterson, 49 Penn. St. 372.

⁴ Marshall, C. J., in Finlay v. King, 3 Pet. 346. In 1 Salk. 570, the devisee had his whole life for performance of the condition, and so may it be in other cases; but "reasonable time" appears the only safe criterion, for one's death may happen very early or very late.

this is too broad a statement, and means no more, properly understood, than to pledge a court of equity to favor one against the harsh operation of conditions, especially of conditions precedent, as generously as circumstances and a due interpretation of the will may permit, where the testator himself has left the point open. On the other hand, as against the rigid prerequisites of the will in respect to time, equity is powerless,¹ unless, indeed, the court can lay hold of other incidents, such as the failure to declare a gift over on non-performance, and thus wrest a reasonable extension of the donee's opportunity to perform out of the will's imperfect and not prohibitive expression.²

But conditions may be pronounced void when clearly repugnant to the gift to which they are annexed. As when, for example, a testator, after plainly devising lands in fee, proceeds to declare some restraint by way of proviso incompatible with one's right of full dominion; that the land shall be cultivated after a certain manner, or let forever upon a stated rent, or so that the devisee's interest shall be that of a life tenant merely.³ Dominion, too, involves the idea of beneficial enjoyment and alienation at pleasure; and a condition not to alienate freely is of course inconsistent with that right of full dominion which a fee imports.⁴ Perhaps the construction of personal bequests above alluded to, where the testator appears to have annexed something which he must have known impossible by way of condition precedent, is explained on this same ground of clear repugnancy.⁵ That a plain and absolute gift of personalty is not to be controlled

¹ As where the conditional donee was abroad, and did not know of the condition precedent until it was too late to choose whether to perform or not. 3 Mer. 7; *Powell v. Rawle*, L. R. 18 Eq. 243.

² See *Hollinrake v. Lister*, 1 Russ. 500; 79 Wis. 557.

A devise on condition which names no time of performance is not barred by lapse of time. *Page v. Whidden*, 59 N. H. 507. But a condition precedent

that next of kin shall establish their claims in a year must be strictly complied with, or the gift over will take effect. *Hartley Re*, 34 Ch. D. 742.

³ 2 Jarm. Wills, 13, 14; Jac. 395; Amb. 479.

⁴ 2 Jarm. Wills, 14, and Bigelow's note; Co. Lit. 206 b; *Willis v. Hiscox*, 4 My. & C. 201. But see §§ 601, 602 *post*.

⁵ *Supra*, § 599, and final note.

and qualified by conditions totally repugnant to the interest given and its incidents follows as of course.¹ And the general rule which upholds the meaning of a will against repugnant words and clauses which cannot be reconciled with its leading purpose has elsewhere been stated.² If a gift of income be absolute, conditions annexed by the will to the principal do not control the income.³ It comes, in fine, to a matter of rational construction; and the general intention discoverable in the will, regarded as a consistent whole, should prevail. And while repugnant conditions or clauses must be stricken out in effect, nothing should be pronounced repugnant which amounts to a legal and proper qualification of the terms under which the gift is bestowed. But public policy may constitute an element in such cases besides; and as conditions are here construed into conditions subsequent rather than precedent,—for conditions precedent are never favored in the construction of wills,⁴—the impossible, illegal, or impolitic condition being rejected, the gift stands absolute.⁵

The doctrine of conditions precedent or subsequent and repugnant, is often involved in the construction of deeds and written contracts; and the illustrations borrowed from cases under those heads may subserve our discussion to bring out the leading principles more clearly, with perhaps the difference that a will of all writings deserves the most flexible interpretation which can lay open the mind of its maker.

§ 601. **Special Conditions considered; Restrictions upon Alienation, etc.**—There are, however, special conditions to be found in wills, by way of restricting, qualifying, or limiting the gift, which deserve our further attention. One of these is the restriction upon alienation. Out of favor to the devisee of lands, we find a great many cases, and especially the older

¹ 2 Jarm. Wills, 19; 1 Coll. 441; words, following a clear and absolute gift, see § 595.
Graham v. Lee, 23 Beav. 388; Pearson v. Dolman, L. R. 3 Eq. 320.

² *Supra*, §§ 478, 518. And so, too, *McElwain v. Congregational Society*, 153 Mass. 238.

in considering the use of precatory ⁴ *Supra*, § 562.

⁵ *Supra*, § 599.

ones, insisting very strongly upon the controlling force of technical words which import a fee, so as to discard peremptorily whatever words of qualification may follow, on the theory that a repugnant condition is attempted, which in consequence must be utterly void. A clause providing that land shall forever be let at a definite rent fails under this prohibition ; and yet, on the other hand, a clause that the rents of existing tenants shall never be raised is pronounced valid and not repugnant.¹ In truth, however, the question is mainly one of intent under the particular will ; and courts stand up for justice and public policy when interpreting a will, and make the construction conform if possible. Rejection for repugnancy is only one of its weapons for making out a lawful and reasonable disposition, and much of the artificial reasoning under this head amounts to nothing more.

This consideration should guide us when examining the cases which relate to express restrictions upon alienation under a will. Conceding that a restraint upon alienation is *per se* repugnant to an estate in fee or absolute gift of any kind, it does not follow that such a condition must always be rejected as repugnant ; for the context may show that this restriction or qualification was of the very essence of the devise or bequest, and that no fee, no absolute gift, was contemplated at all, but a qualified gift, obnoxious in no respect to the law or public policy. We ask, then, what did the will mean, and whether its meaning was to qualify or restrain in a legal and proper manner, or, instead, to annex something to a clear gift incompatible with its proper enjoyment, or in a legal sense impolitic and impossible ; and in the latter case the gift is pronounced good by throwing out the repugnant annexation, but in the former by treating the qualification as blended in the gift and a competent element ; while once more, as we have seen, if the impolitic or impossible were intended to precede the vesting of the gift, it would defeat the gift as a condition precedent, though not if meant for a condition subsequent, for this would render the gift absolute.

¹ See section preceding ; 2 Jarm. Wills, 656 ; Nourse v. Merriam, 8 Cush. 11. 14, citing Tibbits v. Tibbits, 19 Ves.

Yet, we must admit that the rule of the common law which in general terms forbade one to annex to his grant or transfer of property otherwise absolute, the condition that it should not be alienated, was founded to some extent in public policy.¹

§ 602. **The Same Subject.** — The legal force of particular words in conferring a fee may of course interfere with a flexible interpretation of the testator's wishes in such cases. And upon a rigid adherence to the strict technical meaning of terms depend many of the precedents which refuse to treat the condition annexed as other than a repugnant qualification of the inseparable incidents to enjoyment. Thus, if lands are devised to A and his heirs, with condition that he shall not alienate, charge with annuity, and the like, the condition is void; for the devise to A and his heirs is literally interpreted to carry a fee.² A restraint of alienation in some specified mode is held void on similar grounds; or a gift over if the devisee dies intestate or without selling; or a proviso that he shall alienate to no one but B, or must alienate within a given time.³ Yet English cases support the view that a condition not to alienate to a particular class or person, or except to a particular class or person, or for some limited and reasonable period, is good.⁴ The reason for such a distinction does not appear; perhaps it is that qualifications so fair blend more easily with a gift, and suit the presumed wishes of a testator better than the former and rather impolitic ones, by which a creditor would be impeded in collecting his honest claims against the owner. Some have denied this whole doctrine of the testator's right to restrain even for a day the power of alienation;⁵ and yet that the testator's general right to restrain the unfettered disposal of what he gives

¹ Co. Lit. 223 a.

² See *Willis v. Hiscox*, 4 My. & C. 201; 109 Ind. 476.

³ 2 Jarm. 14-17; L. R. 20 Eq. 189; 8 D. M. & G. 152; *Shaw v. Ford*, 7 Ch. D. 669; 35 N. Y. 340, 617.

⁴ Co. Lit. 223 a; *Gill v. Pearson*, 6

East, 173; 2 Jarm. 17-19; *Barnett v. Blake*, 2 Dr. & S. 117. But absolute restraint upon alienation for a stated time is void in law. *Rosher v. Rosher*, 26 Ch. D. 801.

⁵ *Christiancy, J.*, in *Mandlebaum v.*

McDonnell, 29 Mich. 78.

by way of bounty to another exists in some sense can hardly be questioned.¹

As to the gift of personal estate, restraints of alienation have frequently been sustained, so long at least as they operate upon property which has not yet fallen into the donee's full possession and dominion;² for personalty must await payment and distribution, while real estate generally vests in enjoyment at once on the ancestor's death, the probate of the will relating back for that purpose. But to incumber a legacy to A, his executors, administrators, and assigns, with a general restraint upon its disposal or a gift over of what he does not spend or dispose of during his life, and the like, is held in the English chancery courts void for repugnancy, as in a devise.³

Whether, then, in realty or personalty, the true principle of rejecting the repugnant condition of a gift appears to be that, technically speaking, an absolute estate or interest has under the language of the will vested sufficiently in the devisee or legatee; and having so vested, and in the case of personalty having vested moreover in the legatee's own possession and dominion, any further qualification upon the donee's absolute dominion over the property or upon its legal devolution must be inconsistent with the gift and consequently void. If there be more than this in the doctrine, it must consist in some ill-defined principle of public policy which a court of construction may lay hold of to defeat the testator's attempt to restrain alienation in some instances but not in others. For the testator's intention to qualify reasonably

¹ See Bigelow's note to 2 Jarm. Wills, 14, 15, 18. A ground of distinction between English and American precedents under this head is suggested in the larger scope of our public registry system; for the English decisions appear to be based upon the necessity of protecting creditors, whose means of ascertaining incumbrances upon title from the records are imperfect by comparison. 91 U. S. 716. See 133 Mass. 170. That English courts of equity sanctioned

the creation of conditions against alienation in the case of settlements upon a married woman is well known. Schoul. Dom. Rel. § 110.

² *Supra*, §§ 557-559; 2 Jarm. Wills, 19, 22; Churchill v. Marks, 1 Coll. 441.

³ Shaw v. Ford, 7 Ch. D. 669; 1 Ch. D. 229; Henderson v. Cross, 29 Beav. 216; Hill v. Downes, 125 Mass. 506; Dugdale Re, 38 Ch. D. 176; 113 Ind. 18.

what he chooses to bestow is not incapable of taking effect when not contrary to law ; and as we have elsewhere shown, a devise or bequest absolute in terms may be modified in effect by other clauses of the will, so as, for instance, to cut down what appears a fee to a life estate, and otherwise restrict the gift in accordance with the testator's meaning, though not so as to violate his intention.¹ It is true that the English chancery has usually treated an equitable life estate as alienable and liable for the life tenant's debts accordingly.² Notwithstanding the long controversy, however, whether the rule of the common law against restraining alienation should be applied to equitable life estates created under a will, the English chancery rule that this equitable life estate is alienable by the life tenant, subject to his debts, is not universally admitted in this country. On the contrary many of our state courts reject the theory and permit the trust to render the income inalienable by appropriate words.³

§ 603. **Conditions in Restraint of Marriage.**—That public policy affects various special conditions which are treated under the head of repugnancy is undeniable. To take, for instance, the condition in restraint of marriage. Here we find numerous and subtle distinctions drawn out, all of which originate in the rule of the civilians that conditions in general restraint of marriage, although accompanied by a gift over, derogate from public policy and are void. This maxim is admitted in devises of real estate,⁴ though the question more commonly arises in gifts of personalty, where the ecclesiastical courts, in dealing with legacies, borrowed freely from the Roman law and made this canon, among others, quite familiar to our jurisprudence.⁵

As an Anglo-Saxon doctrine, the rule finds important modifications. A condition in palpable and unqualified restraint

¹ *Supra*, § 559.

² 18 Ves. 429.

³ See *Broadway National Bank v. Adams*, 133 Mass. 170, with copious citations, where this subject is fully discussed. And see § 606 *post*.

⁴ 2 Jarm. Wills, 50; 9 East, 170;

Jones v. Jones, 1 Q. B. D. 279.

⁵ 2 Jarm. Wills, 43, 44; *Bellairs v. Bellairs*, L. R. 18 Eq. 510.

of marriage, and to promote celibacy, is indeed void; and public policy is violated whether the testator's object was to induce pure or impure celibacy, and whether he meant to restrain marriage or made a gift whose natural operation is to restrain, without clearly intending that it should so operate.¹ On the other hand, the canon of the civilians against such prohibition is not adopted in its full force; the Anglo-Saxon court gives more heed than did ever Roman tribunal, to the last wishes of a testator, though the will be unnatural, inofficious, or of doubtful legality; and in some of the United States, though we trust not most of them, the disposition has been to repudiate English ecclesiastical precedents and yield to continental maxims and policy no greater respect because of this sort of spiritual sanction.² The modern genius of the age is to find out its own public policy and make that the rule of conduct. Hence are admitted various qualifications. A condition that a widow shall not marry again is in modern times universally upheld as valid.³ Our law puts the remarriage of a widower on the same ground, and permits gifts with corresponding condition to stand;⁴ though in this instance departing from the Roman ecclesiastical rule.⁵ Nor is a partial restraint upon marriage void; such as a condition to marry or not marry with the consent of some one specified;⁶ or to marry or not marry an individual or one of a class of individuals;⁷ or to marry or not marry with prescribed ceremonies⁸ or under fair restrictions as to time,

¹ 2 Jarm. Wills, 43-54, and cases cited, Bigelow's notes; Allen v. Jackson, 1 Ch. D. 399; Bellairs v. Bellairs, *supra*; Cornell v. Lovett, 35 Penn. St. 100; Jones v. Jones, 1 Q. B. D. 279.

² 2 Jarm. Wills, 44.

³ 2 Sim. N. S. 255; Allen v. Jackson, 1 Ch. D. 339; Cornell v. Lovett, 35 Penn. St. 100; Hibbits v. Jack, 97 Ind. 570; 91 Ind. 266; 34 Ch. D. 362; Martin v. Seigler, 32 S. C. 267. And this holds whether the bequest is by the husband or some other person. Newton v. Marsden, 2 J. & H. 356.

⁴ Allen v. Jackson, and Cornell v. Lovett, *supra*.

⁵ 2 Jarm. 44. A gift "during widowhood" is no more than a gift for life. 8 Md. 517.

⁶ 2 Vern. 573; Dashwood v. Bulkeley, 10 Ves. 230. As to marriage with consent of trustees, such consent is matter of substance rather than form. 44 Ch. D. 654.

⁷ Graydon v. Graydon, 23 N. J. Eq. 229; 1 Vern. 19; Davis v. Angel, 4 D. F. & J. 524; Hodgson v. Halford, 11 Ch. D. 959; 16 Ch. D. 188; Phillips v. Ferguson, 85 Va. 509.

⁸ 1 Moll. 611; 2 Jarm. Wills, 44.

place, age, and other circumstances;¹ supposing, of course, that all such conditions are *bona fide*, that compliance or non-compliance therewith is from the nature of things practicable, and that nothing irrational, no covert restraint or prohibition, no violation of policy in other respects, is involved in a gift so qualified.²

Another modification of the rule, which leads, it must be confessed, to some fine and not very satisfactory distinctions, and yet has reason and Roman precedent on its side, is this: that a bequest during celibacy, a *bona fide* provision for one's maintenance while unmarried, and especially for a legatee who had a more natural claim upon the testator's bounty as a single person than if married, will be upheld;³ and no beneficial gift of this kind can be perverted in construction to an injurious and merely conditional one. And so, too, a gift of income or support to A, for life, or "as long as she remains my widow," is less obnoxious than a gift which annexes the condition against re-marriage peremptorily, and may be upheld more confidently, for this is a limitation rather than a condition.⁴

In all cases where conditions in apparent restraint of marriage come into view, it may be an important consideration whether or not the testator has declared a gift over on breach of the condition. In a mere provision for support during celibacy, no gift over is needful; for the bequest is essentially of a temporary and limited kind.⁵ And a gift in general restraint of marriage is void whether a gift over accompanies it or not.⁶ But if the gift be properly a conditional one, courts frequently pronounce the restraint, though a permitted one, mere *in terrorem* words, unless a gift over for breach is added, to make forfeiture complete and show that

¹ 30 W. Va. 171.

² 2 Jarm. Wills, 45-50.

³ 2 Jarm. Wills, 45. The distinction does not hold in gifts of real estate. *Jones v. Jones*, 1 Q. B. D. 274; *Heath v. Lewis*, 3 D. M. & G. 954.

⁴ *Summit v. Yount*, 109 Ind. 506; *Knight v. Mahoney*, 152 Mass. 523; *Brotzman's Appeal*, 133 Penn. St. 478.

Where the gift over in such a case is stated to be on the wife's death, it may be a question whether or not, upon her marriage, the gift over takes immediate effect. *Tredwell Re*, 2 Ch. (1891) 640.

⁵ *Heath v. Lewis*, 3 D. M. & G. 954.

⁶ *Bellairs v. Bellairs*, L. R. 18 Eq. 510; 2 Jarm. 44.

the testator was really in earnest.¹ This *in terrorem* doctrine explores in slippery places; nor are the instances few where conditions precedent appear to have been thus treated, and the legatee's title made absolute, though, logically speaking, it is only in conditions subsequent where the rejection of qualifying terms should leave the gift positive and secure.² But, at all events, a testator has no assurance that his words forbidding marriage with a particular person, or under age, or without the consent of another, or by way of imposing any permitted restraint (except that best founded one as to a widow's remarriage), will be treated in construction as more than an empty threat, unless accompanied by a gift over of the property in case of non-compliance with the condition.³

§ 604. Condition as to Residence, assuming Name, maintaining Good Character, etc.—A condition requiring or forbidding constant residence in some particular place or at some particular house is either to be reasonably interpreted, if possible, or else pronounced void as unreasonable of itself and obnoxious to public policy; and this latter view is always tenable where the restraint must so operate as to involve the donee in some breach of permanent duty, as for example, in compelling married persons to live apart.⁴ A condition may favor the obligations of marriage, but it cannot discourage them.⁵ Ordinarily one who is to be supported under a pro-

¹ 2 Jarm. Wills, 45, and various cases cited; Lloyd v. Branton, 3 Mer. 108; Duddy v. Gresham, 2 L. R. Ir. 442; Cornell v. Lovett, 35 Penn. St. 100; Maddox v. Maddox, 11 Gratt. 804; Harmon v. Brown, 53 Ind. 207; Dawson v. Oliver-Massey, 2 Ch. D. 753; Otis v. Prince, 10 Gray, 581.

² Various reasons have been assigned for this *in terrorem* doctrine; and, as Mr. Jarman has observed, they savor of excessive refinement. The truth is, that the notion of public policy here, as in other instances of the kind, vacillates in the judicial mind, and various shifts are contrived in consequence.

³ See 2 Jarm. 46. A separate equitable estate may be restrained as to alien-

ation during the woman's coverture even if the restriction is made while she was unmarried. 21 Fla. 629.

⁴ See 2 Jarm. Wills, 57, 58; Wilkinson v. Wilkinson, L. R. 12 Eq. 604; 54 Hun, 552; Conrad v. Long, 33 Mich. 79. A life annuity to A, to cease when A and B should cease to reside together, is not determined by B's death. Sutcliffe v. Richardson, L. R. 13 Eq. 606.

⁵ 3 Demarest, 108; Moore *Re*, 39 Ch. D. 116; Hawke v. Euyart, 30 Neb. 149. The cases on this point run somewhat closely, out of deference to the power one has to provide for a legatee's temporary support without directly annexing a condition to the gift. Thus a gift

vision in a will is not limited to live in a particular place, especially if there be good reason for leaving it.¹ But a condition that an infant shall live during minority with a suitable person named as sole guide and guardian may be upheld under most circumstances.²

A gift may be made on condition that the devisee or legatee shall assume the testator's or some other specified name. Such a condition should be fairly construed, and of course fairly complied with, though a formal change of name under act of the legislature is not in all cases indispensable.³ A gift may be made on condition of good conduct and remaining in the homestead for a prescribed period.⁴

In many other instances conditions clear of meaning are upheld as violating no rule of policy. As in a gift on condition that a certain chapel is built in three years,⁵ or on condition of rearing in a prescribed religious faith,⁶ or on condition of trying to defeat a pending lawsuit against the testator,⁷ or on condition that the parties become reconciled.⁸ A gift may be made to a grandson of capital held in trust to be paid him on his arrival at a prescribed age (the income payable to him meanwhile), if, in the judgment of the executors, he has learned a useful trade, business, or profession, and is of good moral character.⁹ A gift may be made on condition of rendering life support to another.¹⁰ Or on condition of the

to a married woman of income so long as she should remain A's wife, with a provision that if she should be left a widow or for any cause should cease to be A's wife, she should have the principal, was held valid in *Thayer v. Spear*, 58 Vt. 327. For here, as the court remarks, there was no direct inducement held out to separation. See also, where the gift was upon condition, but the inducement indirect, *Born v. Horstmann*, 80 Cal. 452.

¹ *Proctor v. Proctor*, 141 Mass. 165.

² *Johnson v. Warren*, 74 Mich. 491. There may be a devise to A of a farm with a condition precedent of "moving upon" it, otherwise a devise over. *Robertson v. Mowell*, 66 Md. 530, 565.

³ See 2 Jarm. Wills, 57; 1 Ch. D. 441; *Barlow v. Bateman*, 3 P. W. 65.

⁴ A gift of this character to a servant girl of eighteen, if she remained in the family until twenty-one, and conducted herself as hitherto, was held forfeited, where she had a bastard child at nineteen and was turned out of the house. *Reuff v. Coleman*, 30 W. Va. 171.

⁵ *Tappan's Appeal*, 52 Conn. 412.

⁶ *Magee v. O'Neill*, 19 S. C. 170.

⁷ *Cannon v. Apperson*, 14 Lea, 553.

⁸ *Page v. Frazer*, 14 Bush, 205.

⁹ *Webster v. Morris*, 66 Wis. 366. And see 59 Hun. 615.

¹⁰ *Irvine v. Irvine* (Ky.) 1891.

reformation of a dissipated beneficiary.¹ That a condition not uncertain or ambiguous happens to be injudicious is insufficient reason for setting it aside, but all conditions should be justly and reasonably construed.

§ 605. **Condition not to dispute the Will, etc.**—Modern wills seek, in some instances, to prevent litigation, by forbidding the beneficiaries named to dispute the will. The law on this point is likely to be more firmly settled hereafter than it is at present. To exclude all contest of the probate on reasonable ground that the testator was insane or unduly influenced when he made it is to intrench fraud and coercion more securely; and public policy should not concede that a legatee, no matter what ground of litigation existed, must forfeit his legacy if the will is finally admitted. As for construction proceedings, the testator's own language may have rendered them necessary. On the other hand, while the probate of the disputed will does not conclude that there was no just cause for opposing it, the testator's last wishes are authenticated as he expressed them; and both in probate and construction proceedings, all speculative and heartless litigation, by which so many estates have been wasted, may well be discountenanced. No arbitrary rule meets well the cases likely to arise under this head, but circumstances ought to influence the construction.

The English rule applied to legacies seems the true one; namely, to treat a condition not to dispute the will as *in terrorem*, and void against sound policy, wherever it appears that the legatee had probable cause for contesting the validity or effect of the will, though not otherwise.² And if the maxim is a just one, it ought to avail as well in a devise; and generally, unless, perhaps, the language of the particular gift and circumstances require the restraint to be interpreted as a strict condition precedent.³ But Mr. Jarman shows that

¹ See *Burnham v. Burnham*, 79 Wis. 557; *Hawke v. Euyart*, 30 Neb. 149.

² 2 Vern. 90; 3 P. W. 344; *Morris v. Burroughs*, 1 Atk. 404; 2 Jarm. Wills, 59.

³ Restraints of marriage *in terrorem*

are usually found as conditions subsequent. Yet we have seen that the doctrine avails quite freely even where the conditions seem imposed rather as precedent to the gift. *Supra*, § 603.

this doctrine has been denied where lands were concerned,¹ and even intimates that the *in terrorem* of such conditions where personalty is given has no greater force than in the permitted restraints of marriage; so that a gift over of the legacy, upon a breach, will make the condition good.²

In this country the question appears still an open one, though a few decisions bearing upon the point may be found. All clauses or provisions of this character should at least be construed as strictly as possible, being penal in their operation.³ In some States the *bona fide* inquiry whether a will was procured through fraud or undue influence is not to be stifled by any prohibition contained in the instrument itself.⁴ But in other States such conditions are lately pronounced valid, both as to real and personal property.⁵

¹ *Cooke v. Turner*, 15 M. & W. 727; 14 Sim. 493. It was here argued that the condition was void as being "contrary to the liberty of the law," an expression to be found in *Shep. Touch.* 132, which seems pertinent, though these words, to be sure, might mean something else. The court responded that there was no policy of the law involved on one side or the other; that marriage, trade, agriculture, and the like, may trench on the liberty of the law, but it is immaterial to the public whether land is enjoyed by the heir or the devisee. This statement appears hardly satisfactory. Is it not for the interest of the public that doubtful issues of authenticity as to one's will should be fairly adjudicated? Collusive proceedings for procuring divorce are not permitted; nor should fraud protect fraud in securing a probate. See *Hoit v. Hoit*, 42 N. J. Eq. 388.

² 2 Jarm. 58, citing 2 P. Wms. 528, and 11 W. R. 935.

³ *Chew's Appeal*, 45 Penn. St. 228.

⁴ *Lee v. Colston*, 5 T. B. Mon. 246; *Jackson v. Westervelt*, 61 How. Pr. 399.

⁵ *Thompson v. Grant*, 14 Lea, 310; *Donegan v. Wade*, 70 Ala. 501; *Bradford v. Bradford*, 19 Ohio St. 546. 1 Redf. Wills, 679, supports this latter view.

"If any or either of my children shall enter a caveat against this my will, he or they shall pay expenses of both sides," is a good condition without a gift over, against a devisee taking real estate under the will. *Hoit v. Hoit*, 42 N. J. Eq. 388.

These conditions are pronounced valid and legal. Not to dispute a person's legitimacy. *Stapilton v. Stapilton*, 1 Atk. 2. Not to become a nun. *Dickson's Trust*, 1 Sim. N. S. 37. Not to interfere with the management of guardians. *Jac.* 257 n. Not to interfere with the trustees (as to an annuitant). 45 Ch. D. 426. Not to bring in a bill against the estate. See *Farnham v. Baker*, 148 Mass. 204. None of these, however, it is submitted, are so obnoxious to sound policy as the condition not to contest the will where reasonable cause for a contest may exist, and either there is fundamental doubt whether the will was the testator's own or the disposition is so doubtfully expressed that only a court can decide what it really meant.

A legacy may be given to a testator's step-son, on condition that the latter's mother, the wife of the testator, does not elect under the statute to take against what the will provides for her. *Carr's Estate*, 138 Penn. St. 352.

§ 606. **Conditions against Bankruptcy or Insolvency.**—One more condition to be noted is that which seeks to protect against the donee's bankruptcy or insolvency. A will which purports to vest in a devisee or legatee either real or personal property or the income of real or personal property, and secure to him its enjoyment free from liability for his debts, is void on grounds of public policy, not to add repugnancy, as being in fraud of the rights of creditors; or, in other words, because it takes away another of the incidents of property as essential as the right to dispose of it.¹ We have already² commented upon the indisposition of chancery to permit the fettering of alienation, and one consequence of the right to alienate is the subjection of the owner's property to his debts. Bankruptcy or insolvency operates as a transfer of one's property by act of law, and an exemption against this mode of transfer is not to be created by a gift.³ But the distinction noted in restraints upon marriage avails once more to distinguish in sense a gift upon condition from a mere limitation. Thus, a gift of the income of property, real or personal, to cease on the bankruptcy or insolvency of the devisee, is held good;⁴ for no absolute transfer is here intended, but only a provision during solvency, an encouragement to the punctual discharge of one's debts, which neither the law nor public policy can denounce. But upon a further extension of this principle, the cases are somewhat discordant; though the main principle which runs through them appears to be that if the devise or bequest over vests any interest in the bankrupt or insolvent himself, anything which he is to receive and enjoy whether by himself or separably in connection with others, it may be paid over to his assignee and appropriated to his debts.⁵ No method then finds clear sup-

¹ 2 Jarm. Wills, 22; *Nichols v. Eaton*, 91 U. S. 716; *Brandon v. Robinson*, 18 Ves. 429, 433; Mr. Justice Miller, in *Nichols v. Eaton*, *supra*.

² *Supra*, § 601.

³ *Nichols v. Eaton*, *supra*.

⁴ *Brandon v. Robinson*, 18 Ves. 433; 1 Bro. C. C. 274; 2 Jarm. 25-42, and cases cited; *Lewin Trusts*, 80; *Tilling-*

hast v. Bradford, 5 R. I. 205; *Nichols v. Eaton*, 91 U. S. 716. Notwithstanding the annulment of an insolvency, the forfeiture took effect in *Broughton Re*, W. N. 109. See, further, *Metcalf v. Metcalfe*, 3 Ch. (1891) 1.

⁵ *Lewin Trusts*, 80; *Nichols v. Eaton*, *supra*; *Samuel v. Samuel*, 12 Ch. D. 125; 2 Jarm. 23, 30, and cases cited.

port to enable a testator to settle the property for the direct and exclusive behoof of his beneficiary through all vicissitudes of fortune. But instead of making the trust simply cease and determine upon his bankruptcy or insolvency, the will may provide that in such event that part of the income shall go to some other person or persons specified, and even to wife and children, since their interests are distinct from his own. Leading American cases, and perhaps the weight of English authority, favor this further proposition: that if the gift over is declared for the support of the bankrupt and his family in such manner as the trustees may think proper, there is nothing left to which creditors or the assignee in bankruptcy can assert a valid claim;¹ and a payment voluntarily made to the bankrupt under the terms of such discretion is not to be disturbed.²

The earlier English rule, which several of our State courts follow, treats an equitable life estate given under a will, as so inseparably subject to the debts of the beneficiary, besides being alienable by him, that no provision, however explicit, which does not operate as a cesser or limitation of the estate itself, can protect it from creditors.³ But various other States have rejected that rule, regarding it sound policy that a testator shall bestow his own property in trust with a prudent regard to the vicissitudes which the object of his bounty is liable to encounter or to the dangers of his improvidence. Accordingly they permit him to qualify his gift, without cesser or limitation at all, by any provision, whether express or implied, direct or indirect, to the effect that the beneficiary's

¹ *Nichols v. Eaton*, 91 U. S. 716; *Easterley v. Keney*, 36 Conn. 18; *Two-penny v. Peyton*, 10 Sim. 487; *Godden v. Crowhurst*, ib. 642. And see *Shankland's Appeal*, 47 Penn. St. 113; *Nickell v. Handy*, 10 Gratt. 336; *Campbell v. Foster*, 35 N. Y. 361; *Pope v. Elliott*, 8 B. Mon. 56.

² See *Nichols v. Eaton*, *supra*, to this effect. In the opinion of the court by Mr. Justice Miller, the cases are exhaustively collected and commented upon. Admitting that the English cases are

not clearly in favor of this view, and that such provisions tend to evade the older policy of the law, it is here maintained that the measure of the rights of creditors, and the policy of subjecting property to one's debts under all circumstances, is not so strongly adverse to the debtor in American States at the present day as the English chancery courts have been wont to define it. See numerous State decisions here cited.

³ Cases *supra*; 5 R. I. 205; 4 Rich. Eq. 131.

right to receive income shall not be alienable by him in anticipation nor subject to be taken by his creditors in advance of payment to him.¹

§ 607. **Limitation, etc., distinguished from Condition.**— One result of our investigation is to confirm the distinction which the law makes between gifts upon condition and gifts upon some limitation, conditional or otherwise. A devise or bequest is by way of limitation when the estate or interest thereby created is bounded or circumscribed in time, so that it cannot last beyond the happening of a stated contingency. The conditional limitation is of a mixed nature, partaking of both condition and limitation; and here the condition is followed by a limitation over to a third person in case the condition be unfulfilled or broken. Thus, a simple gift of property on condition that A shall not remarry is a gift upon condition; a gift on condition that A shall not remarry, otherwise over to C, is a gift upon conditional limitation, and more likely to involve forfeiture on breach of the condition; while a gift which carries the beneficial enjoyment of income to A until his remarriage and no longer, is a gift upon limitation and cannot endure after A marries again.² A testator as the reader has seen may place limitations, not too remote, upon his gift of real or personal property.

§ 608. **Rights and Duties of Testamentary Trustees.**— Trusts, or those rights of property which one party holds for the benefit of another, are cognizable in courts of chancery, and may originate in a variety of ways, with or without formal writings, and whether the holder was selected as a trustee or not. The trust itself arising expressly or by necessary inference, equity will not suffer the trust to fail for

¹ *Rife v. Geyer*, 59 Penn. St. 393; *White v. White*, 30 Vt. 338; 8 B. Mon. 56; *Broadway National Bank v. Adams*, 133 Mass. 170; 151 Mass. 266; 91 U. S. 716, and cases cited. One indirect way of thus keeping out A's creditors is for the testator to give the property to A's daughters subject to the condition that they "support their father during his life." 146 Mass. 369.

² See 4 Kent Com. 122, 126; *supra*, § 603; *Whiting v. Whiting*, 42 Minn. 548. In *Preston Estates*, 1 Washburn Real Property, and other works which treat of real estate, these distinctions are further illustrated.

want of a trustee nor disclaim its inherent jurisdiction to appoint, fill, and create vacancies and supervise the execution of the trust in the interest of the beneficiaries concerned. And the quality and continuance of the trustee's interest in the property under his charge and control must be determined by the purpose and exigency of the trust, which may, as circumstances direct, amount to an estate, interest, or mere power in or affecting the property in question.¹ There may be express trusts, implied trusts, resulting trusts, or constructive trusts; but the operation and policy of the Statute of Frauds and our modern wills acts is to reduce testamentary trusts to the head of express trusts and require them to be created and evidenced by a written instrument duly signed and witnessed. Where the validity of the trust depends upon the effect of the will in transferring title to the property, the will must be executed according to the statute, or it cannot be used as a declaration and proof of the trust.²

Into the general law of trusts and trustees we need not enter. But of testamentary trusts we may observe that probate legislation and practice, especially in the United States, tends at the present day to assimilate such trustees, as to their credentials, the method of their appointment and removal, and the supervision of their functions, to the executor. Wherever, in fact, the testator intends that some trust shall be carried out with reference to the residue of his estate or some portion thereof, wherever there is something more to be done than simply to pay off all debts, demands, and legacies, wind up the affairs and the property, and distribute the balance among the objects designated by the will or statute, permitting both realty and personalty to go absolutely and forever to certain parties, it is proper that the will should declare a trust and designate the trustee or trustees.³ Not that the

¹ See Hill Trustees, 49, 214, 229; Perry Trusts, §§ 1-72.

² Hill Trustees, 61; Perry Trusts, §§ 90-93; Lewin Trusts, 66.

The words "in trust" in a will may be construed to create a use if the in-

tention of the testator or the nature of the gift requires it. But the usual and preferable sense of the term describes a fiduciary estate or technical trust. King v. Mitchell, 8 Pet. 326.

³ In the simple devise of a dwelling-

trust necessarily fails because no trustee is named, any more than a will which names no executor; one may appoint the same persons to be both executors and trustees under his will, or he may appoint different ones; but if the will imports a trust, some trustee or trustees should hold the fund and carry out the particular purpose. The advantage of this is obvious; the testator's intentions, if the court approve the selection, will be carried out by those of his own choice; and, to speak more generally, not only does a legal title support various expectant and contingent or uncertain interests held in suspense, and conditions or restraints upon the dominion of property, which otherwise might fail, but the whole purpose of one's will is executed by some third party who holds the scales between present and future beneficiaries and all contending parties in interest.

§ 609. **The Same Subject.** — Two questions are of importance respecting the nature and quality of the estate taken by trustees under a will: (1) What is the quantum of estate and interest, beneficial as well as legal, vested in them for the active purposes (if any) of the trusts reposed in them; (2) What becomes of the legal estate (if any) remaining after the active purposes of the trusts are satisfied; whether it remains in the trustees or passes from them to the *cestuis que trust*; in other words, whether the estates of persons beneficially interested are equitable or legal.¹ Some artificial distinctions have here been taken in devises of land out of respect to the early Statute of Uses, which preceded the Statute of Wills. But the modern rule, which is aided in England by the statute of Victoria and in this country by local legislation, inclines to vest in trustees a legal estate sufficient for the execution of the trust as an incident to the trust in all cases; at the same time limiting that legal estate to what may be requisite for a complete execution of the trust.²

house to one's widow for life and over in fee to the children, wills frequently declare no trust. But where the gift is more complex as to subject or objects, trustees to hold the fund are desirable.

¹ Hawkins Wills, 140; 2 Jarm. Wills, 291 *et seq.*

² See this subject discussed at due length by general writers on the law of trusts, Perry and Lewin more particu-

Legislation in our several States tends to simplify the administration of testamentary trusts by bringing such trustees under the immediate supervision of the probate court, instead of leaving all to the more indefinite direction of chancery. The same tribunal which authenticates the will and issues letters testamentary to the executor appoints or confirms the appointment of the will by granting letters of trusteeship under its seal in like manner. By the time the decedent's estate is sufficiently advanced in settlement, the trustee named in the will presents a suitable petition, upon the hearing of which the court grants the letters at discretion; and so, too, wherever a vacancy exists by reason of declination or otherwise. Before his credentials issue he must file a bond with sufficient surety approved by the court, unless the will has requested otherwise; and his letters may be revoked on good cause and some one else appointed, the court regarding the security and interests of the beneficiaries in all cases. The executor transfers the trust fund to the trustee thus officially vested with authority to receive it, crediting himself in his accounts accordingly and closing the accounts when his functions are fully performed; and the trustee, returning his own inventory and regular accounts from time to time, carries on the bookkeeping of the estate, or rather of the fund under his own direction, as matter of public record, and under the supervision of the court of probate and of the appellate tribunal which exercises equity jurisdiction, until the trust is completely discharged.¹

§ 610. Trusts which are Invalid or liable to be set aside.—Various trusts which a testator may have attempted to create are pronounced invalid or liable to be set aside. Thus, where a will undertakes to make a person trustee for his own benefit during his life the trust is void; for, in order to con-

larly. See also *Young v. Bradley*, 101 U. S. 782; Stat. 1 Vict. c. 26, §§ 30, 31; *Hawkins Wills*, 140-158; *Doe v. Nichols*, 1 B. & C. 336; *Blagrove v. Blagrove*, 4 Ex. 550; 11 Ad. & El. 188; *Barker v. Greenwood*, 4 M. & W. 421; 2 Jarm. Wills, 289-323, Bigelow's note and numerous cases cited. ¹ See statutes of the several States, which enter fully into the details of such probate jurisdiction.

stitute a valid trust, a trustee, the beneficiary and property, are three distinct essentials, and without each of the three a trust cannot exist.¹ The same person cannot be at the same time trustee and beneficiary of the same identical interest.

Moreover, a court of equity will order trust property under a will to be conveyed by the trustee to the beneficiary, where there was what is called a dry trust, or where the purposes of the trust have been accomplished, or where no good reason appears why the trust should continue and all the persons interested in it are *sui juris* and desire the trust terminated. Thus, as instance of a dry trust, an unqualified gift of the use, income, and improvement of personal property, vests, as we have seen, an absolute interest in the beneficiary, unless the will shows a different intention; and especially does this hold true where there is no gift over of the capital.² Should the testator, therefore, have directed a trust for paying such income to his beneficiary, the latter, if of age and *sui juris*, may have that trust set aside in equity as a dry one and enjoy the property absolutely, unless the court is convinced that good reason exists to the contrary.³

¹ *Rose v. Hatch*, 125 N. Y. 427; 115 N. Y. 346, 357. ³ *Ib.*; 149 Mass. 22; *Perry Trusts*, § 920.

² *Supra*, § 507, and cases cited.

17. 11. 1945

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APPENDIX.

A. LEADING WILLS ACTS, ENGLISH AND AMERICAN.¹

I. ENGLISH STATUTE 1 VICT. C. 26.

An Act for the amendment of the Laws with respect to Wills.

[3d July, 1837.]

BE it enacted, that the words and expressions hereinafter mentioned, which in their ordinary signification have a more confined or a different meaning, shall in this act, except where the nature of the provision or the context of the act shall exclude such construction, be interpreted as follows : (that is to say) the word "will" shall extend to a testament, and to a codicil, and to an appointment by will or by writing in the nature of a will in exercise of a power, and also to a disposition by will and testament or devise of the custody and tuition of any child, by virtue of an act passed in the twelfth year of the reign of King Charles the Second, intituled *An act for taking away the court of wards and liveries and tenures, in capite and by knights service, and purveyance, and for settling a revenue upon his majesty in lieu thereof*, or by virtue of an act passed in the parliament of Ireland in the fourteenth and fifteenth years of the reign of King Charles the Second, intituled *An act for taking away the court of wards and liveries and tenures, in capite and by knights service*, and to any other testamentary disposition ; and the words "real estate" shall extend to manors, advowsons, messuages, lands, tithes, rents, and hereditaments, whether freehold, customary freehold, tenant right, customary or copyhold, or of any other tenure, and whether corporeal, incorporeal, or personal, and to any undivided share thereof, and to any estate, right, or interest (other than a chattel interest) therein ; and the words "personal estate" shall extend to leasehold estates and other chattels real, and also to moneys, shares of government and other funds, securities for money (not being real estates), debts, choses in action, rights, credits, goods, and all other property whatsoever which by law devolves upon the executor or adminis-

¹ The Leading Wills Acts here given are those of England and of four of the United States, viz. : Massachusetts, New York, Pennsylvania, and Virginia. The English statute of 1837 marks a new epoch in the testamentary jurisprudence of the mother country. In this country,

the wills legislation of one or another of the four States here selected, the leading colonies before American independence was declared, each with its own peculiar traits and policy, has most influenced the enactments of the later settled States and Territories.

trator, and to any share or interest therein; and every word importing the singular number only shall extend and be applied to several persons or things as well as one person or thing; and every word importing the masculine gender only shall extend and be applied to a female as well as a male.

II. And be it further enacted, that an act passed in the thirty-second year of the reign of King Henry the Eighth, intituled *The act of wills, wards, and primer seisins, whereby a man may devise two parts of his land*; and also an act passed in the thirty-fourth and thirty-fifth years of the reign of the said King Henry the Eighth, intituled *The bill concerning the explanation of wills*; and also an act passed in the parliament of Ireland, in the tenth year of the reign of King Charles the First, intituled *An act how lands, tenements, etc., may be disposed by will or otherwise and concerning wards and primer seisins*; and also so much of an act passed in the twenty-ninth year of the reign of King Charles the Second, intituled *An act for prevention of frauds and perjuries*, and of an act passed in the parliament of Ireland in the seventh year of the reign of King William the Third, intituled *An act for prevention of frauds and perjuries*, as relates to devises or bequests of lands or tenements, or to the revocation or alteration of any devise in writing of any lands, tenements, or hereditaments, or any clause thereof, or to the devise of any estate *pur autre vie*, or to any such estates being assets, or to nuncupative wills, or to the repeal, altering, or changing of any will in writing concerning any goods or chattels or personal estate, or any clause, devise, or bequest therein; and also so much of an act passed in the fourth and fifth years of the reign of Queen Anne, intituled *An act for the amendment of the law and the better advancement of justice*, and of an act passed in the parliament of Ireland in the sixth year of the reign of Queen Anne, intituled *An act for the amendment of the law and the better advancement of justice*, as relates to witnesses to nuncupative wills; and also so much of an act passed in the fourteenth year of the reign of King George the Second, intituled *An act to amend the law concerning common recoveries, and to explain and amend an act made in the twenty-ninth year of the reign of King Charles the Second, intituled "An act for prevention of frauds and perjuries,"* as relates to estates *pur autre vie*; and also an act passed in the twenty-fifth year of the reign of King George the Second, intituled *An act for avoiding and putting an end to certain doubts and questions relating to the attestation of wills and codicils concerning real estates in that part of Great Britain called England, and in his majesty's colonies and plantations in America*, except so far as relates to his majesty's colonies and plantations in America; and also an act passed in the parliament of Ireland in the same twenty-fifth year of the reign of King George the Second, intituled *An act for the avoiding and putting an end to certain doubts and questions relating to the attestations of wills and codicils concerning real estates*; and also an act passed in the fifty-fifth year of the reign of King George the Third, intituled *An act to remove certain difficulties in*

the disposition of copyhold estates by will, shall be and the same are hereby repealed, except so far as the same acts or any of them respectively relate to any wills or estates *pur autre vie*, to which this act does not extend.

III. And be it further enacted, that it shall be lawful for every person to devise, bequeath, or dispose of, by his will executed in manner hereinafter required, all real estate and all personal estate which he shall be entitled to, either at law or in equity, at the time of his death, and which, if not so devised, bequeathed, or disposed of, would devolve upon the heir-at-law, or customary heir of him, or, if he became entitled by descent, of his ancestor, or upon his executor or administrator; and that the power hereby given shall extend to all real estate of the nature of customary freehold or tenant right, or customary or copyhold, notwithstanding that the testator may not have surrendered the same to the use of his will, or notwithstanding that, being entitled as heir, devisee, or otherwise, to be admitted thereto, he shall not have been admitted thereto, or notwithstanding that the same, in consequence of the want of a custom to devise or surrender to the use of a will or otherwise, could not at law have been disposed of by will if this act had not been made, or notwithstanding that the same, in consequence of there being a custom that a will or a surrender to the use of a will should continue in force for a limited time only, or any other special custom, could not have been disposed of by will according to the power contained in this act, if this act had not been made; and also to estates *pur autre vie*, whether there shall or shall not be any special occupant thereof, and whether the same shall be freehold, customary freehold, tenant right, customary or copyhold, or of any other tenure, and whether the same shall be a corporeal or an incorporeal hereditament; and also to all contingent, executory, or other future interests in any real or personal estate, whether the testator may or may not be ascertained as the person or one of the persons in whom the same respectively may become vested, and whether he may be entitled thereto under the instrument by which the same respectively were created or under any disposition thereof by deed or will; and also to all rights of entry for conditions broken, and other rights of entry; and also to such of the same estates, interests, and rights respectively, and other real and personal estate as the testator may be entitled to at the time of his death, notwithstanding that he may become entitled to the same subsequently to the execution of his will.

IV.¹ Provided, always, and be it further enacted, that where any real estate of the nature of customary freehold or tenant right, or customary or copyhold, might by the custom of the manor of which the same is holden, have been surrendered to the use of a will, and the testator shall not have surrendered the same to the use of his will, no person entitled or claiming to be entitled thereto by virtue of such will, shall be entitled to be admitted, except upon payment of all such stamp duties, fees, and sums of

¹ See 4 & 5 Vict. c. 35, §§ 88-90.

money as would have been lawfully due and payable in respect of the surrendering of such real estate to the use of the will, or in respect of presenting, registering, or enrolling such surrender, if the same real estate had been surrendered to the use of the will of such testator: Provided also, that where the testator was entitled to have been admitted to such real estate, and might if he had been admitted thereto, have surrendered the same to the use of his will, and shall not have been admitted thereto, no person entitled or claiming to be entitled to such real estate in consequence of such will shall be entitled to be admitted to the same real estate by virtue thereof, except on payment of all such stamp duties, fees, fine, and sums of money as would have been lawfully due and payable in respect of the admittance of such testator to such real estate, and also of all such stamp duties, fees, and sums of money as would have been lawfully due and payable in respect of surrendering such real estate to the use of the will, or of presenting, registering, or enrolling such surrender, had the testator been duly admitted to such real estate, and afterwards surrendered the same to the use of his will; all which stamp duties, fees, fine, or sums of money due as aforesaid shall be paid in addition to the stamp duties, fees, fine, or sums of money due or payable on the admittance of such person so entitled or claiming to be entitled to the same real estate as aforesaid.

V. And be it further enacted, that when any real estate of the nature of customary freehold or tenant right, or customary or copyhold, shall be disposed of by will, the lord of the manor or reputed manor of which such real estate is holden, or his steward, or the deputy of such steward, shall cause the will by which such disposition shall be made, or so much thereof as shall contain the disposition of such real estate, to be entered on the court rolls of such manor or reputed manor; and when any trusts are declared by the will of such real estate, it shall not be necessary to enter the declaration of such trusts, but it shall be sufficient to state in the entry on the court rolls that such real estate is subject to the trusts declared by such will; and when any such real estate could not have been disposed of by will if this act had not been made, the same fine, heriot, dues, duties, and services shall be paid and rendered by the devisee as would have been due from the customary heir in case of the descent of the same real estate, and the lord shall as against the devisee of such estate have the same remedy for recovering and enforcing such fine, heriot, dues, duties, and services as he is now entitled to for recovering and enforcing the same from or against the customary heir in case of a descent.

VI. And be it further enacted, that if no disposition by will shall be made of any estate *pur autre vie* of a freehold nature, the same shall be chargeable in the hands of the heir, if it shall come to him by reason of special occupancy, as assets by descent as in the case of freehold land in fee simple; and in case there shall be no special occupant of any estate *pur autre vie*, whether freehold or customary freehold, tenant right, customary or copyhold, or of any other tenure, and whether a corporeal or

incorporeal hereditament, it shall go to the executor or administrator of the party that had the estate thereof by virtue of the grant; and if the same shall come to the executor or administrator either by reason of a special occupancy or by virtue of this act, it shall be assets in his hands, and shall go and be applied and distributed in the same manner as the personal estate of the testator or intestate.

VII. And be it further enacted, that no will made by any person under the age of twenty-one years shall be valid.

VIII. Provided also, and be it further enacted, that no will made by any married woman shall be valid, except such a will as might have been made by a married woman before the passing of this act.

IX. And be it further enacted, that no will shall be valid unless it shall be in writing and executed in manner hereinafter mentioned; (that is to say), it shall be signed at the foot or end thereof by the testator, or by some other person in his presence and by his direction; and such signature shall be made or acknowledged by the testator in the presence of two or more witnesses present at the same time, and such witnesses shall attest and shall subscribe the will in the presence of the testator, but no form of attestation shall be necessary.

X. And be it further enacted, that no appointment made by will, in exercise of any power, shall be valid, unless the same be executed in manner hereinbefore required; and every will executed in manner hereinbefore required shall, so far as respects the execution and attestation thereof, be a valid execution of a power of appointment by will, notwithstanding it shall have been expressly required that a will made in exercise of such power should be executed with some additional or other form of execution or solemnity.

XI. Provided always, and be it further enacted, that any soldier being in actual military service, or any mariner, or seaman being at sea, may dispose of his personal estate as he might have done before the making of this act.

XII. And be it further enacted, that this act shall not prejudice or affect any of the provisions contained in an act passed in the eleventh year of the reign of his majesty King George the Fourth, and the first year of the reign of his late majesty King William the Fourth, intituled *An act to amend and consolidate the laws relating to the pay of the royal navy*, respecting the wills of petty officers and seamen in the royal navy, and non-commissioned officers of marines, and marines, so far as relates to their wages, pay, prize money, bounty money, and allowances, or other moneys payable in respect to services in her majesty's navy.

XIII. And be it further enacted, that every will executed in manner hereinbefore required shall be valid without any other publication thereof.

XIV. And be it further enacted, that if any person who shall attest the execution of a will shall at the time of the execution thereof or at any time afterwards be incompetent to be admitted a witness to prove the execution thereof, such will shall not on that account be invalid.

XV. And be it further enacted, that if any person shall attest the execution of any will to whom or to whose wife or husband any beneficial devise, legacy, estate, interest, gift, or appointment, of or affecting any real or personal estate (other than and except charges and directions for the payment of any debt or debts), shall be thereby given or made, such devise, legacy, estate, interest, gift, or appointment shall, so far only as concerns such person attesting the execution of such will, or the wife or husband of such person, or any person claiming under such person or wife or husband, be utterly null and void, and such person so attesting shall be admitted as a witness to prove the execution of such will, or to prove the validity or invalidity thereof, notwithstanding such devise, legacy, estate, interest, gift, or appointment, mentioned in such will.

XVI. And be it further enacted, that in case by any will any real or personal estate shall be charged with any debt or debts, and any creditor, or the wife or husband of any creditor, whose debt is so charged, shall attest the execution of such will, such creditor notwithstanding such charge shall be admitted a witness to prove the execution of such will, or to prove the validity or invalidity thereof.

XVII. And be it further enacted, that no person shall, on account of his being an executor of a will, be incompetent to be admitted a witness to prove the execution of such will, or a witness to prove the validity or invalidity thereof.

XVIII. And be it further enacted, that every will made by a man or woman shall be revoked by his or her marriage (except a will made in exercise of a power of appointment, when the real or personal estate thereby appointed would not in default of such appointment pass to his or her heir, customary heir, executor, or administrator, or the person entitled as his or her next of kin, under the statute of distributions).

XIX. And be it further enacted, that no will shall be revoked by any presumption of an intention on the ground of an alteration in circumstances.

XX. And be it further enacted, that no will or codicil, or any part thereof, shall be revoked otherwise than as aforesaid, or by another will or codicil executed in manner hereinbefore required, or by some writing declaring an intention to revoke the same, and executed in the manner in which a will is hereinbefore required to be executed, or by the burning, tearing, or otherwise destroying the same by the testator, or by some person in his presence and by his direction, with the intention of revoking the same.

XXI. And be it further enacted, that no obliteration, interlineation, or other alteration made in any will, after the execution thereof, shall be valid or have any effect except so far as the words or effect of the will before such alteration shall not be apparent, unless such alteration shall be executed in like manner as hereinbefore is required for the execution of the will; but the will, with such alteration as part thereof, shall be deemed to be duly executed if the signature of the testator and the subscription of

the witnesses be made in the margin, or on some other part of the will opposite or near to such alteration, or at the foot or end of or opposite to a memorandum referring to such alteration, and written at the end or some other part of the will.

XXII. And be it further enacted, that no will or codicil or any part thereof, which shall be in any manner revoked, shall be revived otherwise than by the re-execution thereof, or by a codicil executed in manner hereinbefore required, and showing an intention to revive the same; and when any will or codicil which shall be partly revoked, and afterwards wholly revoked, shall be revived, such revival shall not extend to so much thereof as shall have been revoked before the revocation of the whole thereof, unless an intention to the contrary shall be shown.

XXIII. And be it further enacted, that no conveyance or other act made or done subsequently to the execution of a will of or relating to any real or personal estate therein comprised, except an act by which such will shall be revoked as aforesaid, shall prevent the operation of the will with respect to such estate or interest in such real or personal estate as the testator shall have power to dispose of by will at the time of his death.

XXIV. And be it further enacted, that every will shall be construed, with reference to the real estate and personal estate comprised in it, to speak and take effect as if it had been executed immediately before the death of the testator, unless a contrary intention shall appear by the will.

XXV. And be it further enacted, that, unless a contrary intention shall appear by the will, such real estate or interest therein as shall be comprised or intended to be comprised in any devise in such will contained, which shall fail or be void by reason of the death of the devisee in the lifetime of the testator, or by reason of such devise being contrary to law or otherwise incapable of taking effect, shall be included in the residuary devise (if any) contained in such will.

XXVI. And be it further enacted, that a devise of the land of the testator, or of the land of the testator in any place or in the occupation of any person mentioned in his will, or otherwise described in a general manner, and any other general devise which would describe a customary, copyhold, or leasehold estate if the testator had no freehold estate which could be described by it, shall be construed to include the customary, copyhold, and leasehold estates of the testator, or his customary, copyhold, and leasehold estates, or any of them, to which such description shall extend, as the case may be, as well as freehold estates, unless a contrary intention shall appear by the will.

XXVII. And be it further enacted, that a general devise of the real estate of the testator, or of the real estate of the testator in any place or in the occupation of any person mentioned in his will, or otherwise described in a general manner, shall be construed to include any real estate, or any real estate to which such description shall extend (as the

case may be), which he may have power to appoint in any manner he may think proper, and shall operate as an execution of such power, unless a contrary intention shall appear by the will; and in like manner a bequest of the personal estate of the testator, or any bequest of personal property described in a general manner, shall be construed to include any personal estate, or any personal estate to which such description shall extend (as the case may be), which he may have power to appoint in any manner he may think proper, and shall operate as an execution of such power, unless a contrary intention shall appear by the will.

XXVIII. And be it further enacted, that where any real estate shall be devised to any person without any words of limitation, such devise shall be construed to pass the fee simple, or other the whole estate or interest which the testator had power to dispose of by will in such real estate, unless a contrary intention shall appear by the will.

XXIX. And be it further enacted, that in any devise or bequest of real or personal estate the words "die without issue," or "die without leaving issue," or "have no issue," or any other words which may import either a want or failure of issue of any person in his lifetime or at the time of his death, or an indefinite failure of his issue, shall be construed to mean a want or failure of issue in the lifetime or at the time of the death of such person, and not an indefinite failure of his issue, unless a contrary intention shall appear by the will, by reason of such person having a prior estate tail, or of a preceding gift being, without any implication arising from such words, a limitation of an estate tail to such person or issue, or otherwise: Provided, that this act shall not extend to cases where such words as aforesaid import if no issue described in a preceding gift shall be born, or if there shall be no issue who shall live to attain the age or otherwise answer the description required for obtaining a vested estate by a preceding gift to such issue.

XXX. And be it further enacted, that where any real estate (other than or not being a presentation to a church) shall be devised to any trustee or executor, such devise shall be construed to pass the fee simple or other the whole estate or interest which the testator had power to dispose of by will in such real estate, unless a definite term of years, absolute or determinable, or an estate of freehold, shall thereby be given to him expressly or by implication.

XXXI. And be it further enacted, that where any real estate shall be devised to a trustee, without any express limitation of the estate to be taken by such trustee, and the beneficial interest in such real estate, or in the surplus rents and profits thereof, shall not be given to any person for life, or such beneficial interest shall be given to any person for life, but the purposes of the trust may continue beyond the life of such person, such devise shall be construed to vest in such trustee the fee simple, or other the whole legal estate which the testator had power to dispose of by will in such real estate, and not an estate determinable when the purposes of the trust shall be satisfied.

XXXII. And be it further enacted, that where any person to whom any real estate shall be devised for an estate tail or an estate in quasi entail shall die in the lifetime of the testator leaving issue who would be inheritable under such entail, and any such issue shall be living at the time of the death of the testator, such devise shall not lapse, but shall take effect as if the death of such person had happened immediately after the death of the testator, unless a contrary intention shall appear by the will.

XXXIII. And be it further enacted, that where any person being a child or other issue of the testator to whom any real or personal estate shall be devised or bequeathed for any estate or interest not determinable at or before the death of such person shall die in the lifetime of the testator leaving issue, and any such issue of such person shall be living at the time of the death of the testator, such devise or bequest shall not lapse, but shall take effect as if the death of such person had happened immediately after the death of the testator, unless a contrary intention shall appear by the will.

XXXIV. And be it further enacted, that this act shall not extend to any will made before the first day of January, one thousand eight hundred and thirty-eight, and that every will re-executed or republished, or revived by any codicil, shall for the purposes of this act be deemed to have been made at the time at which the same shall be so re-executed, republished, or revived; and that this act shall not extend to any estate *pur autre vie* of any person who shall die before the first day of January, one thousand eight hundred and thirty-eight.

XXXV. And be it further enacted, that this act shall not extend to Scotland.

XXXVI. And be it further enacted, that this act may be amended, altered, or repealed by any act or acts to be passed in this present session of parliament.

II. MASSACHUSETTS WILLS ACT.¹

§ 1. Every person of full age and sound mind may by his last will in writing, signed by him or by some person in his presence and by his express direction, and attested and subscribed in his presence by three or more competent witnesses, dispose of his estate, real and personal, excepting an estate tail, and excepting also as is provided in chapters 123 and 124, [*i.e.*, except as to homesteads and certain rights of a husband in his deceased wife's real estate, and of a wife in her deceased husband's real estate] and in § 6 of chapter 147 [which permits a married woman to make a will, but restrains her from depriving her husband of his tenancy by the curtesy, or of more than one-half of her personal estate without his written consent].

§ 2. If a witness to a will is competent at the time of his attestation, his subsequent incompetency shall not prevent the probate and allowance

¹ See Mass. Public Statutes (1882), c. 127.

of such will, nor shall a mere charge on the lands of the testator for the payment of his debts prevent his creditors from being competent witnesses to his will.

§ 3. A beneficial devise or legacy made in a will to a person who is a subscribing witness thereto, or to the husband or wife of such a person, shall be void unless there are three other competent subscribing witnesses to such will.

§ 4. A will made and executed in conformity with the law existing at the time of its execution shall be equally effectual as if made pursuant to the provisions of this chapter.

§ 5. A will made out of the commonwealth, and which is valid according to the laws of the state or country where it was made, may be proved and allowed in this commonwealth, and shall thereupon have the same effect that it would have had if executed according to the laws of this commonwealth.

§ 6. A soldier in actual military service or a mariner at sea may dispose of his personal estate by a nuncupative will.

§ 7. No will, except such as is mentioned in this chapter, shall be effectual to pass any estate, real or personal, or to change or in any way affect the same; and no will shall take effect until it has been duly proved and allowed in the probate court. Such probate shall be conclusive as to the due execution of the will.

§ 8. No will shall be revoked unless by the burning, tearing, cancelling, or obliterating the same, with the intention of revoking it, by the testator himself or by some person in his presence and by his direction; or by some other writing signed, attested and subscribed in the same manner that is required in the case of a will; but nothing contained in this section shall prevent the revocation implied by law from subsequent changes in the condition or circumstances of the testator.

[The word "will" shall include codicils as used above. See Mass. Pub. Stats. (1882) c. 3, § 3, pl. 24.]

III. NEW YORK WILLS ACT.¹

§ 1. All persons, except idiots, persons of unsound mind, and infants, may devise their real estate, by a last will and testament, duly executed according to the provisions of this title.

§ 2. Every estate and interest in real property descendible to heirs, may be so devised.

§ 3. Such devise may be made to every person capable by law of holding real estate; but no devise to a corporation shall be valid, unless such corporation be expressly authorized by its charter, or by statute, to take by devise.

¹ Taken from "New York Revised Statutes," Throop's 7th edition, 1882, Vol. III. Pt. 2, c. 6.

[§ 4. Devises to aliens.]

[§ 5. Will of real estate denoting intent to devise all one's real property, shall be construed to pass all he is entitled to devise at the time of his death.]

[§§ 6-20 repealed.]

§ 21. Every male person of the age of eighteen years or upwards, and every female of the age of sixteen years or upwards, of sound mind and memory, and no others, may give and bequeath his or her personal estate, by will in writing.

§ 22. No nuncupative or unwritten will, bequeathing personal estate, shall be valid, unless made by a soldier while in actual military service, or by a mariner while at sea.

§ 40. Every last will and testament of real or personal property, or both, shall be executed and attested in the following manner:

1. It shall be subscribed by the testator at the end of the will.

2. Such subscription shall be made by the testator, in the presence of each of the attesting witnesses, or shall be acknowledged by him to have been so made to each of the attesting witnesses.

3. The testator, at the time of making such subscription, or at the time of acknowledging the same, shall declare the instrument so subscribed to be his last will and testament.

4. There shall be at least two attesting witnesses, each of whom shall sign his name as a witness, at the end of the will, at the request of the testator.

§ 41. The witnesses in any will shall write opposite to their names their respective places of residence; and every person who shall sign the testator's name to any will by his direction shall write his own name as a witness to the will. Whoever shall neglect to comply with either of these provisions, shall forfeit fifty dollars, to be recovered by any person interested in the property devised or bequeathed, who shall sue for the same. Such omission shall not affect the validity of any will; nor shall any person liable to the penalty aforesaid, be excused or incapacitated on that account, from testifying respecting the execution of such will.

§ 42. No will in writing, except in the cases hereinafter mentioned, nor any part thereof, shall be revoked or altered, otherwise than by some other will in writing, or some other writing of the testator, declaring such revocation or alteration, and executed with the same formalities with which the will itself was required by law to be executed; or unless such will be burnt, torn, cancelled, obliterated, or destroyed, with the intent and for the purpose of revoking the same, by the testator himself, or by another person in his presence, by his direction and consent; and when so done by another person, the direction and consent of the testator, and the fact of such injury or destruction, shall be proved by at least two witnesses.

[(§ 43.) The excepted cases which follow provide for the revocation of a will, which disposes of the whole estate, by subsequent marriage of the

testator, and the birth of issue, where wife or the issue shall be living at the testator's death, and is unprovided for, unless so mentioned in the will as to show an intention to make no provision.

(§ 44.) Will of unmarried woman revoked by her subsequent marriage.

(§ 45.) Bond, etc., to convey property, devised or bequeathed, not a revocation.

(§ 46.) Charge or incumbrance upon real or personal estate not a revocation.

(§§ 47, 48.) Conveyance, settlement, etc., when to be deemed a revocation.

(§ 49.) After-born child, if unprovided for, to have portion of estate.

(§ 50.) Devisee or legatee may witness will, but devise to him void.

(§ 51.) Except that share of estate is saved to such witness in certain cases.

(§ 52.) Devises or bequests in certain cases not to lapse.

(§ 53.) Cancelling of second will not to revive first, except, etc.

(§ 69.) Provision as to act going into effect concerning revocation; and (§ 70) prior wills not affected.

(§ 71.) "Wills" in this chapter to include "codicils."]

IV. PENNSYLVANIA WILLS ACT.¹

§ 1. Every person of sound mind [married women excepted] may dispose by will of his or her real estate, whether such estate be held in fee-simple, or for the life or lives of any other person or persons, and whether in severalty, joint-tenancy, or common, and also of his or her personal estate.

§ 2. Any married woman may dispose, by her last will and testament, of her separate property, real, personal, or mixed, whether the same accrue to her before or during coverture: *Provided*, That the said last will and testament be executed in the presence of two or more witnesses, neither of whom shall be her husband.

§ 3. *And provided also*, That no will shall be effectual, unless the testator were, at the time of making the same, of the age of twenty-one years or upwards, at which age the testator may dispose of real as well as personal or mixed property, if in other respects competent to make a will.

[§ 4 authorizes the appointment of testamentary guardian by will.]

[§ 5 permits the bequest of emblements and rents by tenant for life.]

§ 6. Every will shall be in writing, and unless the person making the same shall be prevented by the extremity of his last sickness, shall be signed by him at the end thereof, or by some person in his presence, and by his express direction; and in all cases, shall be proved by the oaths or

¹ Brightly's Purdon's Digest (1700-1883), Vol. II. "Wills."

affirmations of two or more competent witnesses ; otherwise such will shall be of no effect.

§ 7. Every last will and testament heretofore made or hereafter to be made, excepting such as may have been finally adjudicated prior to the passage of this act, to which the testator's name is subscribed, by his direction and authority, or to which the testator hath made his mark or cross, shall be deemed and taken to be valid in all respects : *Provided*, The other requisites, under existing laws, are complied with.

§ 8. *Provided*, That personal estate may be bequeathed by a nuncupative will, under the following restrictions :

I. Such will shall in all cases be made during the last sickness of the testator and in the house of his habitation or dwelling, or where he has resided for the space of ten days or more, next before the making of such will ; except where such person shall be surprised by sickness, being from his own house, and shall die before returning thereto.

II. Where the sum or value bequeathed shall exceed one hundred dollars, it shall be proved that the testator, at the time of pronouncing the bequest, did bid the persons present, or some of them, to bear witness that such was his will or to that effect ; and in all cases, the foregoing requisites shall be proved by two or more witnesses, who were present at the making of such will.

§ 9. *Provided*, That notwithstanding such act, any mariner being at sea, or any soldier being in actual military service, may dispose of his movables, wages, and personal estate, as he might have done before the making of this act.

[§§ 10-15 relate to points of testamentary construction.]

§ 16. No will in writing concerning any real estate shall be repealed, nor shall any devise or direction therein be altered, otherwise than by some other will or codicil in writing, or other writing declaring the same, executed and proved in the same manner as is hereinbefore provided, or by burning, cancelling, or obliterating or destroying the same by the testator himself, or by some one in his presence, and by his express direction.

§ 17. No will in writing concerning any personal estate shall be repealed, nor shall any bequest or direction therein be altered, otherwise than is hereinbefore provided in the case of real estate, except by a nuncupative will, made under the circumstances aforesaid, and also committed to writing in the lifetime of the testator, and after the writing thereof, read to or by him, and allowed by him, and proved to be so done by two or more witnesses.

[§§ 18-20 concern the effect of subsequent marriage or birth of children as operating to revoke, etc.]

[§ 21 restrains the married woman's right of testamentary disposition so far that her surviving husband may elect instead to take under the intestate laws. § 22 forbids the bequest to charity within one month of the donor's decease. §§ 23-26 relate to matters of construction, the execution of testamentary powers, etc.]

V. VIRGINIA WILLS ACT.¹

[§ 1 construes the word "will" as applying to codicil, testamentary appointment, etc.]

§ 2. Every person not prohibited by the following section may, by will, dispose of any estate to which he shall be entitled at his death, and which, if not so disposed of, would devolve upon his heirs, personal representative, or next of kin. The power hereby given shall extend to any estate, right, or interest to which the testator may be entitled at his death, notwithstanding he may become so entitled subsequently to the execution of the will.

§ 3. No person of unsound mind, or under the age of twenty-one years, shall be capable of making a will, except that minors eighteen years of age or upwards may, by will, dispose of personal estate; nor shall a married woman be capable of making a will, except for the disposition of her separate estate, or in the exercise of a power of appointment.

§ 4. No will shall be valid unless it be in writing and signed by the testator, or by some other person in his presence and by his direction, in such manner as to make it manifest that the name is intended as a signature; and moreover, unless it be wholly written by the testator, the signature shall be made or the will acknowledged by him in the presence of at least two competent witnesses, present at the same time; and such witnesses shall subscribe the will in the presence of the testator, but no form of attestation shall be necessary.

§ 5. No appointment made by will, in exercise of any power, shall be valid unless the same be so executed that it would be valid for the disposition of the property to which the power applies, if it belonged to the testator; and every will so executed, except the will of a married woman, shall be a valid execution of a power of appointment by will, notwithstanding the instrument creating the power expressly require that a will made in execution of such power shall be executed with some additional or other form of execution or solemnity.

§ 6. Notwithstanding the two next preceding sections, a soldier being in actual military service, or a mariner or seaman being at sea, may dispose of his personal estate as he might heretofore have done; and the will of a person domiciled out of this state at the time of his death, shall be valid as to personal property in this state, if it be executed according to the law of the state or country in which he was so domiciled.

§ 7. Every will made by a man or woman shall be revoked by his or her marriage, except a will made in exercise of a power of appointment, when the estate thereby appointed would not, in default of such appointment, pass to his or her heir, personal representative, or next of kin.

§ 8. No will or codicil, or any part thereof, shall be revoked, unless under the preceding section, or by a subsequent will or codicil, or by some

¹ Code of Virginia (1873), c. 118.

writing declaring an intention to revoke the same, and executed in the manner in which a will is required to be executed, or by the testator, or some person in his presence and by his direction, cutting, tearing, burning, obliterating, cancelling, or destroying the same, or the signature thereto, with the intent to revoke.

§ 9. No will or codicil, or any part thereof, which shall be in any manner revoked, shall, after being revoked, be revived otherwise than by the re-execution thereof, or by a codicil executed in manner hereinbefore required, and then only to the extent to which an intention to revive the same is shown.

§ 10. No conveyance or other act subsequent to the execution of a will shall, unless it be an act by which the will is revoked as aforesaid, prevent its operation, with respect to such interest in the estate comprised in the will, as the testator may have power to dispose of by will at the time of his death.

[§§ 11-16 establish rules of testamentary construction in certain cases. §§ 17, 18 provide for pretermitted children.]

§ 19. If a will be attested by a person to whom, or to whose wife or husband, any beneficial interest in any estate is thereby devised or bequeathed, if the will may not be otherwise proved, such person shall be deemed a competent witness, but such devise or bequest shall be void, except that, if such witness would be entitled to any share of the estate of the testator, in case the will were not established, so much of his share shall be saved to him as shall not exceed the value of what is so devised or bequeathed.

§ 20. If a will charging any estate with debts be attested by a creditor, or the wife or husband of a creditor whose debt is so charged, such creditor shall notwithstanding be admitted a witness for or against the will.

§ 21. No person shall, on account of his being an executor of a will, be incompetent as a witness for or against the will.

[The remaining sections of this chapter relate to the date when a will shall operate and to probate proceedings.]

B. FORMS OF WILLS.

NO. 1. *A solemn form of will, once common, where a married man of property provided for his family.*

In the name of God, Amen. I, A B, of, etc., being in good bodily health,¹ and of sound and disposing mind and memory, calling to mind the frailty and uncertainty of human life, and being desirous of settling my

¹ If the testator is in failing health, and of sound and disposing mind," etc.; he should prefer to say something like or, "being in declining health, but of this: "being in sufficiently good health sound and disposing mind, etc."

worldly affairs, and directing how the estates with which it has pleased God to bless me shall be disposed of after my decease, while I have strength and capacity so to do, do make and publish this my last will and testament, hereby revoking and making null and void all other last wills and testaments by me heretofore made. And, first, I commend my immortal being to Him who gave it, and my body to the earth, to be buried with little expense or ostentation, by my executors hereinafter named.

And as to my worldly estate, and all the property, real, personal, or mixed, of which I shall die seized and possessed, or to which I shall be entitled at the time of my decease, I devise, bequeath, and dispose thereof in the manner following, to wit:—

Imprimis. My will is, that all my just debts and funeral charges shall, by my executors hereinafter named, be paid out of my estate, as soon after my decease as shall by them be found convenient.¹

Item. I give, devise, and bequeath to my beloved wife, C B, all my household furniture, and my library in my mansion or dwelling-house, my pair of horses, coach, and chaise, and their harnesses; and also fifteen thousand dollars in money, to be paid to her by my executors hereinafter named, within six months after my decease; to have and to hold the same to her, and her executors, administrators, and assigns forever. I also give to her the use, improvement, and income of my dwelling-house, and its appurtenances, situated in —, my warehouse, situated in —, and my wharf, situated in —, and called — Wharf; to have and to hold the same to her for and during her natural life.

Item. I give and bequeath to my honored mother, O B, two thousand dollars in money, to be paid to her by my executors hereinafter named, within six months after my decease; to be for the sole use of herself, her heirs, executors, administrators, and assigns.

Item. I give and bequeath to my daughter, D B, my fifty shares of the stock of the president, directors, and company of the — Bank, which are of the par value of five thousand dollars, my fifty shares in the stock of the — Insurance Company, which are of the par value of five thousand dollars, and my ten shares of the stock of the — Manufacturing Company, which are of the par value of ten thousand dollars; to have and to hold the same, together with all the profit and income thereof, to her the said D B, her heirs, executors, administrators, and assigns, to her and their use and benefit forever.

Item. I give, devise, and bequeath to my son, E B, the reversion or remainder of my dwelling or mansion house, situated in —, and its appurtenances, and all profit, income, and advantage that may result therefrom, from and after the decease of my beloved wife, C B; to have and to hold the same to him the said E B, his heirs and assigns, from and after the decease of my said wife, to his and their use and behoof forever.

¹ This direction is, of course, merely formal, but many testators still prefer its insertion as an aid to actual intent.

Item. I give, devise, and bequeath to my son, F B, the reversion or remainder of my warehouse, situated in —, and its appurtenances, and all the profit, income, and advantage that may result therefrom, from and after the decease of my beloved wife, C B; to have and hold the same to the said F B, his heirs and assigns, from and after the decease of my said wife, to his and their use and behoof forever.

Item. I give, devise, and bequeath to my son, G B, the reversion or remainder of my wharf, situated in —, called — Wharf, and its appurtenances, and all the profit, income, and advantage that may result therefrom, from and after the decease of my beloved wife, C B; to have and to hold the same to the said G B, his heirs and assigns, from and after the decease of my said wife, to his and their use and behoof forever.

Item. All the rest and residue of my estate, real, personal, or mixed, of which I shall die seized and possessed, or to which I shall be entitled at the time of my decease, I give, devise, and bequeath, to be equally divided to and among my said sons, E B, F B, and G B.

Lastly. I do nominate and appoint my said sons, E B, F B, and G B, to be the executors of this my last will and testament [and request that each and all of them may be exempt from giving any surety or sureties upon their official bond¹].

In testimony whereof, I, the said A B, have to this my last will and testament, contained on three sheets of paper, and to every sheet thereof, subscribed my name, and to this the last sheet thereof I have here subscribed my name and affixed my seal, this first day of May, in the year of our Lord one thousand eight hundred and thirty-six.

A B. [L. S.]

Signed, sealed, published, and declared by the said A B as and for his last will and testament, in presence of us, who, at his request, and in his presence, and in the presence of each other, have subscribed our names as witnesses hereto.²

U V.

W X.

Y Z.

No. 2. *Will in simplest form, giving to one absolutely all the testator's real and personal estate.*

This is the last will and testament of me [testator's name and residence]. I give, devise, and bequeath all the real and personal estate of every description, to which I shall be entitled at the time of my decease, unto [devisee's name and residence], absolutely [; but as to estates vested in

¹ It is matter of prudent discretion in the testator to omit or insert this clause. See *supra*, §§ 300-356. In some States

² The attestation clause may vary somewhat, as well as the number of witnesses, according to circumstances and the local requirements of legislation. In some States the residence of witnesses should be given, and this is always a safe precaution.

me upon trust or by way of mortgage, subject to the trusts and equities affecting the same respectively¹]. And I appoint the said [name] sole executor of this my last will, hereby revoking all other testamentary writings. Witness my hand and seal this 15th day of January, A.D. 1886.

Witnesses—

A B. [L. S.]²

U V.

W X.

Y Z.

No. 3. *Will intended for the appointment of executors merely, the property to go as in case of the maker's intestacy.*

I, A B, of, etc., do hereby make this my last will and testament.

I appoint my son, C D, and my son-in-law, E F, to be executors of this will, and direct that they shall not be required to give sureties upon their bond as such.

I dispose of my property and estate in the same manner as the same would descend and be distributed by law, if this will had not been made, my purpose being only to appoint executors and exempt them from being required to give sureties upon their bond, but not in any way to change the disposition which the law would otherwise make of my estate.

In testimony whereof, I, the said A B, hereto set my hand and seal, and publish and declare this to be my last will and testament in presence of the witnesses named below, on this twentieth day of January, in the year of our Lord one thousand eight hundred and seventy.

A B. [SEAL.]

Signed, sealed, published, and declared by the above-named A B as and for his last will and testament in presence of us, who, in his presence, and in the presence of each other, and at his request, have hereto subscribed our names as witnesses.

U V.

W X.

Y Z.

No. 4. *A simple form of will, which makes the widow one's residuary legatee.*

Know all men by these presents, that I, A B, of, etc., do make and declare this to be my last will and testament, hereby revoking any and all wills by me at any time heretofore made.

I give and bequeath to each of my children, C D, E F, G H and I J, the sum of five thousand dollars.

I give and bequeath to my daughter K L the sum of five dollars.

¹ This clause is not indispensable. ness clause, though very desirable, is

² Even the seal may be omitted. not an essential. *Supra*, § 346.
Supra, § 309. And the customary wit-

All the residue of my estate real and personal of which I shall die seized and possessed, or to which I shall at my decease in any way be entitled, I give, devise, and bequeath to my beloved wife M N, to have and to hold the same to her, her heirs and assigns forever.

I nominate and appoint my said wife M N to be the sole executrix of my estate, and direct that she be exempted from giving sureties on her official bond.

In witness whereof I hereunto set my hand and seal, and publish and declare this to be my last will, this fourth day of April, in the year of our Lord one thousand eight hundred and eighty-five.

A B. [SEAL.]

Signed, sealed, published, and declared by the said A B as and for his last will and testament, in presence of us who, in his presence, and at his request, and in the presence of each other, have subscribed our names as witnesses.

U V.

W X.

Y Z.

No. 5. A will which places the residue in trust for the benefit of an unmarried niece during life, and to go at her death to her child, etc., if she has any, otherwise to other relatives of the testator.

Be it known that I, A B, of, etc., gentleman, feeling how uncertain life is, and wishing to dispose of my property in a manner different from that which applies to the estate of persons intestate, do now make, publish, and declare this to be my last will and testament, viz. :—

First: I wish all my just debts and funeral expenses be promptly paid.

Secondly: I give and bequeath unto my brother-in-law, C D, of Cincinnati, two thousand dollars.

Thirdly: I give and bequeath unto my faithful servant, E F, five hundred dollars as a token of my esteem for him.

Fourthly: I give and bequeath unto the Children's Hospital of New York city, a corporation duly incorporated under the laws of the State of New York, the sum of five thousand dollars.

Fifthly: I give and bequeath unto G H, of Boston Eye and Ear Infirmary, in case she be living at the time of my decease, one hundred dollars, as an acknowledgment of her kind care of my sister during her last sickness.

Sixthly: I give and bequeath unto my cousin, I J, of, etc., my gold watch, chain, and appurtenances, with my best wishes for the future.

Seventhly: All the residue and remainder of my estate, wheresoever and whatsoever it may be, at the time of my decease (including any lapsed legacies) and all rights, claims, and properties, real, personal, or mixed, and whether now held or hereafter obtained by me, I do give, devise, and bequeath unto the said C D, his heirs, executors, administrators, succes-

sors, and assigns, to have and to hold the same forever. But nevertheless IN TRUST, and upon the uses and trusts and for the purposes following, namely: To be held, managed, and invested, and from time to time, as need be, reinvested by the said C D, trustee, or his successor in said trust, for the benefit and advantage of my only niece, K L, daughter of the said C D, and in such good and productive stocks or mortgages as will produce, if possible, a sure and regular income, the whole net interest or income of which fund is to be paid over to the said K L during her natural life (and as often as once every six months, if desired) upon her own order or receipt, and without being subject in any degree to the order, intervention, or control of any husband she may have, or of any creditor of her or her husband aforesaid; my object being to secure to her during her natural life, the use and enjoyment of all the income of said property (which is to be invested productively) beyond the control of her said husband or of any such creditor; and upon the decease of the said K L, the said principal trust fund and all earnings or accumulations thereon then remaining unclaimed by her in the hands of said trustee or of his successor in said trust, after deducting the expenses incident to the trust, is to be paid over and distributed to the issue of her body then living, if any (the issue, if any, of her children to take the same share that their deceased parent would have taken if so living by right of representation), for their use and benefit forever, share and share alike. But in case the said K L shall die without lawful issue or direct heirs as aforesaid claiming through the said K L, then and in such case the whole of said principal trust fund and the net earnings remaining shall be paid over and belong to the said C D, if then living, or in case of his death, to his lawful heirs, for his or their own proper use and benefit forever.

Eighthly: I do hereby fully authorize and empower the trustee above named, or any successor in said trust, to sell and dispose of any property real or personal that I may have at the time of my decease, and to make good and valid instruments of transfer thereof or any part thereof or any rights therein for the purposes aforesaid (and no purchaser shall be bound to see to the application of the purchase-money or consideration paid therefor) and also to change the investments from time to time and as often as the said trustee for the time being may think proper for the end and purposes above mentioned. And in case of the death, refusal, or inability of the said C D to act as said trustee, the Judge of Probate for the county or place where this will may be proved may appoint some other person to act as trustee as aforesaid, and such new trustee, so to be appointed, is to have all and the same powers and to perform the same duties as the trustee above mentioned. My desire being to have the property prudently and securely managed rather than hazarded in what may promise great gains. And I hereby revoke all other wills heretofore made by me. And

Lastly: I appoint the said C D executor of this will.

In testimony whereof, I, the said A B, have hereunto set my hand and seal this ninth day of February, eighteen hundred and fifty-two.

A B. [L. s.]

The foregoing was signed, sealed, published, and declared by said A B to be his last will and testament in our presence, who, at his request and in his presence and in presence of each other, have hereunto set our hands as witnesses thereof, the day and year last above written.

U V.

W X.

Y Z.

No. 6. *Will and codicil of a single woman, who gives the bulk of her estate to personal friends and in charity.*

I, A B, of, etc., single woman, make this my last will and testament, and revoke all former wills.

First: I appoint C D of, etc., executor of this will, and exempt him from giving any bond with surety. I empower my executor and my administrator with the will annexed to sell and convey any land, without the aid of any court, by public or private sale, at discretion.

Second: I give to each of the persons hereinafter named ten thousand dollars, to wit: E F, G H, I J, K L, M N, and O P, six legacies making sixty thousand dollars.

Third: I give to each of the persons hereinafter named five thousand dollars, to wit: Q R and S T, two legacies making ten thousand dollars.

Fourth: I give to the Boston Athenæum five thousand dollars.

Fifth: I give all my household furniture, wearing apparel, jewelry, books, pictures and other effects at my lodgings to E F.

Sixth: My private letters and papers which are chiefly at my lodgings, — meaning hereby all papers not relating to business, — I direct my executor to burn.

Seventh: All the residue and remainder of my property and estate, whatsoever and wheresoever, I give and devise to the three following corporations, in equal shares: namely, the Young Women's Christian Association of Boston, the Trustees of Boston University, and the Boston Provident Association.

Witness my hand and seal to this my will, the second day of September, in the year one thousand eight hundred and seventy-three.

A B. [SEAL.]

Signed, sealed, published, and declared by the above-named A B as and for her last will and testament, in presence of us, who, in her presence, and at her request, and in presence of each other, have hereto set our hands as witnesses.

U V.

W X.

Y Z.

No. 7. *Codicil annexed to the foregoing will.*

I, A B, make this codicil to my last will and testament which was dated Sept. 2, 1873.

First: I give to M N, in addition to her former legacy, five thousand dollars.

Second: I cancel and revoke the legacy of five thousand dollars given to S T.

Third: I give to G H the portrait of my grandmother, painted by Hunt, which is at my lodgings.

Fourth: To the Trustees of Boston University I give the portrait of my father by Morse.

Fifth: I appoint K L, named in my will, co-executor with C D, and exempt him from giving any bond. In all other respects I confirm my will. Witness my hand and seal this twenty-second day of August, in the year one thousand eight hundred and seventy-six.

A B. [SEAL.]

Signed, sealed, published and declared by the above-named A B as and for a codicil to her last will and testament, in presence of us, who, in her presence, and at her request, and in presence of each other, have hereto set our hands as witnesses.

U V.

W X.

Y Z.

C. SUGGESTIONS TO PERSONS MAKING THEIR WILLS.

1. Consider at the outset, whether you are disqualified by the law, wholly or partially, from making a will; or to speak, more particularly, whether you are a minor, a married woman, or an alien.¹

2. Consider whether, by reason of old age or other infirmity, there is any ground for the imputation that your mind is unsound; and if so, make no will unless you have good reason; and when making one, fortify carefully against litigation, both in your scheme of disposition and the proof you leave behind of your mental capacity at the time of the act and that the will was properly executed.²

3. Similar considerations apply where you are of intemperate habits, or lately delirious in a fever, or reputed to be queer or crazy on some subject.³

4. Consider whether your situation exposes you to the suspicion of being defrauded, coerced, or subject to the undue influence of certain persons; as if, for instance, you should be blind, illiterate, or confined to a sick room and excluded from social intercourse. Here, again, be very

¹ *Supra*, §§ 31-64. ² *Supra*, §§ 165-213. ³ *Supra*, §§ 121-128, 143-168.

careful of the proof that you executed intelligently and of your own free will, and be sure that the instrument is altogether genuine. If your disposition is to benefit some one whose access and opportunity of influencing you is much greater than others having equal natural claims upon your bounty, hedge in the testamentary act all the more carefully with strong and ample proof.¹

5. A will entirely in your own handwriting affords the best proof that it is genuine. But take heed, when writing out your own will, that its legal expression is sufficiently clear and exact, else a contest may arise over its meaning. One cannot afford to be too secretive.

6. Laymen often err in supposing they can draw wills with more breadth of apprehension and accuracy than a lawyer, and in expressing themselves as though persons in their own trade were to profit by or interpret them. The technical words of the law are better understood than those of any mere business pursuit; and both for clearly comprehending the legal effect of your scheme of disposition and for clearly expressing what you comprehend, you should take professional advice. If you purpose an unnatural or complicated disposition of property, involving a considerable estate, it would be very unwise to make the will without consulting some competent third person and submitting to him your plans or your draft.² Lawyers themselves have often plunged their own estates into doubtful disputes, by over-confidence in drawing their own wills, without asking for advice and criticism.

7. In these days the safest will is that which deals justly by the natural objects of one's bounty and distributes in a simple manner; attempting little beyond limiting property so as to give the income to some person for life, with capital over on his death,³ if limiting at all.

8. Avoid, if possible, precatory words, and uncertainty in gifts, and be careful as to creating conditions, limitations, remainders, etc. Skilful expression and technical knowledge may here prove indispensable.⁴ Joint and mutual wills, contingent wills, and all such peculiar kinds give rise to grave disputes.⁵

9. Take care not to transgress local rules against perpetuities and in restraint of accumulation, nor in other respects to make provisions subversive of good morals and sound policy.⁶

10. Remember that in various aspects, bearing upon the construction of wills and the right of persons to take under such dispositions, each State has its own legislation.

¹ *Supra*, §§ 214-251.

² Wills drawn up without legal advice, and directing that no lawyer should be employed in settling the estate, but that every dispute should be settled by "three judicious, honest men," are likely to invite the litigation they seek to

avoid. Mr. Justice Story in *Brownell v. De Wolf*, 3 Mason, 486.

³ See Forms of Wills, Nos. 1, 5.

⁴ See *supra*, Part VI. chaps. 2, 4.

⁵ *Supra*, Part V.; also §§ 285-291.

⁶ *Supra*, §§ 21, 22, 601-660.

11. In the description of the property devised or bequeathed, and of the object of the gift (not to add the interest given), be careful and accurate.¹

12. Be explicit and clear of mind as concerns the time when interests immediate or expectant shall vest. It is best to keep in view that your will naturally intends to take effect at your death upon your property as it then exists and the objects of bounty, or their relatives, who may then be living. Prefer that interests shall vest at that period or not much later, and let the expression of your will correspond.²

13. The rule of taking *per capita* or *per stirpes* is also important. Whether in case your devisee or legatee dies before you, or before his interest vests, you wish his children or other representatives to take his share, is to be considered.³ The whole question of lapsing by death is an important one in such gifts.

14. In the last two respects and in general a testator who limits property should consider to what period ownership shall be referred, and how far and in what sense persons are to participate as survivors. If a gift is made to "children," or to others of a class, it is important to know whether the death of one shall carry his share to the others of that class.⁴

15. There are some technical words, such as "heirs," "heirs of body," "issue," which should be employed with discrimination, and the more so where real estate is disposed of.⁵

16. It is useful, and in some cases indispensable, to have trustees to preserve a fund whose capital is not to be at once distributed, but preceded by temporary and successive interests in the property. You had better designate your trust and trustee plainly, just as you would an executor, unless, perhaps, being married, you intend to dispose in favor of your surviving spouse and children, and so give the income for life to such spouse, with reversion to the children; or possibly in some other case, where a parent will be practically a trustee as respects his or her own offspring.

17. A will is hardly worth making if you intend to give nothing outside your immediate family, and as among these to fix their proportions strictly by the statutes of descent or distribution. But a will may be useful for naming an executor,⁶ or you may wish to make only a partial disposition or to execute a power.⁷

18. Observe scrupulously the statute requirements when executing your will, as to signature, the presence of witnesses, the method of their attestation, their number, their competency, and the like. If, from any cause, your free and intelligent consent to the instrument is likely to be challenged after your death, be as punctilious and circumspect as the cir-

¹ See Part VI. chap. 2.

² *Supra*, §§ 562-566.

³ *Supra*, §§ 538-543.

⁴ *Supra*, §§ 529-537.

⁵ *Supra*, Part VI. chap. 2.

⁶ See *supra*, § 297. As to constituting a testamentary guardian, see § 294. See also Forms of Wills, No. 3.

⁷ *Supra*, §§ 298, 299.

cumstances permit. Talk with the witnesses and others, and impress upon them your capable condition. Your witnesses should be disinterested, clear-headed persons, whose testimony will carry favorable weight in support of the will. In some cases it will be prudent to have the instrument read aloud in the presence of others before you sign. Never have a legatee for a witness; and if there is danger of a contest, do not let those whom disappointed relatives will charge with unfairly influencing your disposition be too prominent when the instrument is signed and witnessed.¹

19. Permit no alteration of any kind, as a rule, in the instrument after it has been executed; but if a change be needful, re-execute with care, or execute a new instrument. As for altering or revoking your will more generally, consider the modes permitted by law, and pursue those strictly.²

20. Remember that marriage, or at all events marriage and the birth of a child, revokes a will already made;³ that modern statutes infer a revocation *pro tanto*, to let in a child born later than the will for whom no provision is made;⁴ that a child to be disinherited should be named; and that a surviving wife (and in some States a surviving husband) may elect against the will of a spouse, to take as the local statute permits.⁵

21. As for making a new will or codicil, you should be guided by circumstances. A last will composed of one instrument with several later amendments is inconvenient for various reasons. If your health and situation render it doubtful whether the latest codicil or codicils can be admitted to probate, keep the earlier instrument intact, if you would rather have that take effect than die intestate. But if intestacy is your preference, or if you are undoubtedly competent and free to make your present will, the better course is to destroy utterly whatever instrument or instruments precede, and make a new will which shall embrace the whole disposition and stand as sufficient by itself. The best and simplest revocation, moreover, is to burn and utterly destroy; for, to keep an old will among your papers, with marks of cancelling not sufficient to obliterate what was written, or alterations in ink or pencil, is to run the risk of having your true intention misunderstood or perverted at the probate.⁶

22. Keep your will in such custody that it is not likely to be lost, destroyed, or tampered with, but rather to be properly presented at the probate court after your death. In some States provision is made so that one may have his will kept in a sealed envelope at the registry of probate, subject to his own order while he lives, and not to be opened until after his death. The register's receipt is given for such envelope.

¹ *Supra*, §§ 300-356.

² *Supra*, §§ 380-427.

³ *Supra*, §§ 424-426.

⁴ *Supra*, §§ 20, 480, 481.

⁵ *Supra*, § 19.

⁶ See *passim*, §§ 380-427.

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ADDENDA.

New cases noted while this volume in its second edition was passing through the press :—

§ 21, p. 19, note 1. The rule against perpetuities has no application to a transfer directed in a certain event from one charity to another. *Tyler Re*, 1891, 3 Ch. 252.

§ 22, p. 21, note 4. See *post*, § 603.

§ 139, p. 137, note 4. See *White v. Starr*, 47 N.J. Eq. 244.

§ 239, p. 254, note 7. See *Seebrook v. Fedawa*, 30 Neb. 424.

§ 269, p. 289, note 8. See *Slinn's Goods*, 15 P.D. 156.

§ 424, p. 452, note 3. See *Stewart v. Powell* (Ky.) 1891; 87 Cal. 643.

§ 465, p. 499, note 1. Also § 470, p. 503, note 5. A will was construed as to its whole meaning, and with reference to the use of certain words not terms of art. "I repudiate entirely," said Halsbury, L.C., "the notion of laying down any canon of construction which is to extend beyond the particular instrument that I am called to give an interpretation to." *Seale-Hayne v. Jodrell*, 44 Ch. D. 590. Decision of C. A. affirmed by H. L. (E.) 1891. App. C. 304.

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